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IN THE

Supreme Court of the United States

ROBERT W. LEE, SR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Third Circuit denied an appeal by petitioner, Robert W. Lee, Sr. ("Lee"), from a judgment of conviction in a criminal case. Petitioner Lee was indicted on charges stemming from the alleged payment of bribes by boxing promoters to Lee and other officials of the International Boxing Federation ("IBF"). After a jury trial, Lee was convicted of one count of conspiracy to engage in money laundering, in violation of 18 U.S.C. § 1956(h); three counts of interstate travel in aid of racketeering, in violation of 18 U.S.C. § 1952 and 19 U.S.C. § 2; and two counts of filing false tax returns, in violation of 26 U.S.C. § 7206.

The main evidence underlying the counts of conviction were videotapes of meetings on three separate occasions between Lee and a government informant, in Lee's hotel room. The videotapes were made by the Federal Bureau of Investigation ("FBI") without a warrant using a hidden, remote-controlled camera that was secreted in Lee's hotel room before he occupied it. In a pretrial hearing on Lee's motion to suppress the videotapes, the government relied on the "invited informant" doctrine to justify its warrantless search and seizure. The district court denied Lee's suppression motion and admitted the videotaped evidence at trial over Lee's objection.

Upon his conviction, Lee appealed to the Court of Appeals for the Third Circuit, arguing that the videotapes allegedly showing him receiving money from the confidential government informant violated his Fourth Amendment rights and should have been suppressed. On February 20, 2004, in a 2-1 decision, a divided panel of the Third Circuit rejected Lee's Fourth Amendment challenge to the admissibility of

the videotapes. On March 23, 2004, the Third Circuit denied Lee's Petition for Rehearing *En Banc* on this same issue.

In holding that the admission of the videotaped evidence did not violate Lee's rights under the Fourth Amendment, the Third Circuit's decision directly conflicts with the holdings of the United States Supreme Court in *Katz v. United States*, 389 U.S. 347 (1967); *United States v. Hoffa*, 385 U.S. 293 (1966) and *Kyllo v. United States*, 533 U.S. 27 (2001). The Third Circuit's decision is also inconsistent with holdings in the First, Eighth and Ninth Circuits.

The following question is presented in this Petition for a Writ of Certiorari:

1. Does an individual forfeit his reasonable expectation of privacy to those things which he *unknowingly* exposes to the public?

LIST OF PARTIES

The parties to the proceedings in this Court are listed in the caption of the present Petition.

CORPORATE DISCLOSURE STATEMENT

Petitioner, Robert W. Lee, Sr., is an individual party. There is no parent corporation or publicly held company involved in the current proceedings.

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The initial opinion of the United States Court of Appeals for the Third Circuit is reported at *United States v. Robert W. Lee, Sr.*, 359 F.3d 194 (3d Cir. 2004). *See* Appendix A.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The Third Circuit entered a Judgment and filed an Opinion on February 20, 2004. *See* Appendix A. Petitioner Lee filed a Petition for Rehearing *En Banc*, which was denied by the Third Circuit on March 23, 2004. *See* Appendix C.

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. amend. IV

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Petitioner, Robert W. Lee, Sr.'s, Petition for a Writ of Certiorari arises from the affirmance on appeal of his judgment of conviction of six federal crimes for conspiring to accept "commercial bribes," in exchange for affecting the rankings of professional boxers and the sanctioning of professional boxing matches. Lee is the founder and past president of the International Boxing Federation, one of professional boxing's three main sanctioning bodies.

The main evidence underlying the counts of conviction were videotapes of meetings on three separate days between Lee and C. Douglas Beavers, the IBF's Ratings Chairman, in Lee's hotel room. The videotapes were made by the FBI without a warrant using a hidden camera that was secreted in Lee's hotel room before he occupied it. The video camera was operated remotely by an FBI agent from an adjoining room, which the FBI had rented for that purpose. The camera had a 360-degree swivel capability, audio capability and was able to scan and focus on different parts of the room. The camera transmitted a continuous, live signal to the room next door where the FBI operated monitoring and recording equipment. On each of the three days in question, Lee stayed the night in his hotel room with the hidden, fully functional FBI camera.

In a hearing on Lee's motion to suppress the videotapes, an FBI agent testified that she turned the monitor and recorder on only when the informant, Beavers, entered the room and turned it off when Beavers left the room. The government relied on the "invited informant" doctrine to justify this warrantless search and seizure. *See*, *United States v. Hoffa*, 385 U.S. 293 (1966); *United States v. White*, 401 U.S. 745 (1971). The district court denied Lee's suppression motion and admitted the videotaped evidence at trial over Lee's objection.

On appeal, a divided panel of the Third Circuit Court of Appeals held that Lee's Fourth Amendment challenge to admissibility of the videotapes "is inconsistent with well-established Fourth Amendment precedent concerning the electronic monitoring of conversations with the consent of a participant." (App. A at 5a) The majority found that Lee had an expectation of privacy in his hotel suite "so long as he was alone there, [but] when Lee allowed Beavers to enter, any expectation of privacy vis-à-vis Beavers vanished." (App. A at 9a)

The majority found three circumstances surrounding the hidden camera in the hotel room of an accused, as opposed to the person of an invited informant, that "would matter for Fourth Amendment purposes." (App. A at 10a) Two of them are relevant to this case. The majority found that "cases involving consensual monitoring do not apply if recordings are made when the cooperating individual is not present." (App. A at 11a) Also, "the logic of those cases is likewise inapplicable if the placement of the recording device permits it to pick up evidence that the cooperating individual could not have heard or seen while in the room." *Id.* The majority was satisfied that "the tapes do not depict anything material that Beavers himself was not in a position to hear or see while in the room." (App. A at 13a)

The dissent found the majority's opinion to be "an unjustified and unsupportable extension of *Hoffa* and its progeny." (App. A at 33a) The majority, according to the dissent, "allow *Hoffa* to swallow *Katz* on this record, and gulp down the Fourth Amendment in the process." (App. A at 36a)

The dissent noted that neither *Hoffa* nor this Court's earlier decision in *Lopez v. United States*, 373 U.S. 427 (1963), allows the government to "substitute its own electronically enhanced

senses for the mortal senses of the informant" (App. A at 44a) The dissent wrote:

> Putting aside for a moment the ability to monitor Lee's suite when Beavers left, absent a showing that Beavers and Agent Reilly were limited to the identical observations while Beavers was in Lee's suite, the government's surveillance simply goes too far. The problem is only exacerbated by the fact that Agent Reilly had the capability of monitoring Lee at all hours of the day and night even though Beavers was not in the suite. As noted above, it is clear under *Katz* that the fact that Agent Reilly did not peek is not relevant to this invasion of Lee's privacy under the Fourth Amendment.

(App. A at 44a-45a)

The dissent's concern is not merely hypothetical in this case. The videotapes reveal violations of Lee's privacy that, even by the majority's standards, "would matter for Fourth Amendment purposes." The FBI's hidden camera had a significantly different and greater field of vision than Beavers did while he was in Lee's hotel room. On more than one occasion, the FBI filmed Lee's activities when Beavers left the room to use the bathroom in the adjoining bedroom. The FBI repeatedly filmed Lee making phone calls to family members about intimate family matters, sometimes when Beavers was present and, on one occasion, when he was not.

The videotape of December 18, 1997 illustrates all of these constitutional violations. At one point, the FBI filmed Lee making a telephone call to his son, in which he discussed his sick daughter, after Beavers had excused himself to use the bathroom in the

adjoining bedroom of Lee's hotel suite. The transcript of that conversation revealed the following:

R. Lee, Sr.: Yeah (UI) Well listen, I'm going to make one more phone call then you want to grab a little.

D. Beavers: Yeah.

R. Lee, Sr.: Sandwich or something?

D. Beavers: We can do that.

R. Lee, Sr.: Yeah, let me, let me uh....

D. Beavers: I'm going to use the bathroom.

R. Lee, Sr.: Yeah.

(TELEPHONE ACTIVITY)

R. Lee, Sr.: Hey Luke, this is Bob. Hey Luke, yeah, um, hold, hold on maybe I, I, uh, he didn't leave a number, did he? Yeah, alright, ah, maybe I'll try to call him, he's, he's, he's down in Ventnor so I'll lay to reach him Yeah, yeah alright I'll try to reach him down in Ventnor. Yeah, listen is Robby [Lee's son] there? Let me talk to him for a minute. Rob, hey listen, I talked to Cheryl [Lee's late daughter] before, you know she, she a little upset she got to go to the doctors on Tuesday, but she eh, she said she didn't have any money, can you run by there and give her something? She wanted it until I get back. Yeah, ah, she didn't call you, did she? Alright. But I told her to call you and, it, get something from you till I got back,

> you know, so. Yeah, well, call her and see when, when she wants you to bring it by there, you know, when you want, okay? Alright, I'll talk to you later. Bye.

See Appendix D.

In denying Lee's suppression motion, the district court noted that "There were instances . . . where perfection was not achieved," (App. C at 73a) but, like the majority here, found the lapses were not material. The dissent disagreed, "The problem is that Lee's reasonable expectation of privacy was violated, not that the violation may not have revealed anything that was 'material' or of evidentiary significance." (App. A at 51a) Indeed, "the Fourth Amendment's protection of the home has never been tied to measurement of the quality or quantity of information obtained . . . [A]ny physical invasion of the structure of the home, 'by even a fraction of an inch,' [is] too much." *Kyllo v. United States*, 533 U.S. 27, 37 (2001), quoting, *Silverman v. United States*, 365 U.S. 505, 512 (1961).

REASONS FOR GRANTING THE PETITION

I. Review Is Warranted To Resolve A Conflict Concerning The Application Of The Consenting Party/ Invited Informant Doctrine To Video Surveillance Of A Suspect

A. The Majority Decision is Inconsistent With the Holdings of this Court in *Hoffa*, *Katz* and *Kyllo* because It Extends the Consenting Party/Invited Informant Doctrine to Personal Effects that an Individual Unknowingly Exposes to the Public

"With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no." *Kyllo v. United States*, 533 U.S. at 31. One of those few exceptions is the so-called invited informant doctrine, which holds that a party does not have a reasonable expectation of privacy in those things that he knowingly discloses to a third party who has consented to the search. *See Hoffa v. United States*, 385 U.S. 293 (1966); *United States v. White*, 401 U.S. 745 (1971) Where an informant with a body transmitting device stands before his subject, the speaker has no reasonable expectation that the listener will keep the conversation private. The Fourth Amendment does not protect "a wrongdoer's misplaced belief that a person to whom he voluntarily confided his wrongdoing will not reveal it." *Hoffa*, 385 U.S. at 302.

The invasion of a person's privacy under such circumstances is minimal; an informant can only record what he was already able to hear and relate to the authorities. Accordingly, as this Court in *Katz v. United States* explained, an individual forfeits his reasonable expectation of privacy only to those things which "a person *knowingly* exposes to the public[.]" *Katz*, 389 U.S. at 347 (emphasis added).

Over the years, technological advances in surveillance techniques have exposed the limitations of the invited informant exception to the warrant requirement of the Fourth Amendment. This Court in *Kyllo* recognized the impact of advances in technology upon privacy rights guaranteed by the Fourth Amendment, stating "It would be foolish to contend that the degree of privacy secured by the Fourth Amendment has been entirely unaffected by the advance of technology." *Kyllo*, 533 U.S. at 33-34. The concern implicated by the advance of technology in the present context is that modern surveillance techniques, such as those used here, allow the government to exceed the bounds of what an individual *knowingly* exposes to a consenting party.

This Court in *Kyllo* made a distinction, relevant to the Fourth Amendment analysis at hand here, between the lessened degree of privacy afforded to areas such as telephone booths, automobiles, or the curtilage and uncovered portions of residences on the one hand, and the *interior* of an individual's home on the other. *Kyllo*, 533 U.S. at 30. (emphasis supplied) This Court in *Kyllo*, while recognizing its prior observation in *California v. Ciraolo*, 476 U.S. 207, 213 (1986), that "[t]he Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares," *Id.*, at 31, distinguished such a circumstance from one involving the interior of homes, stating that in such an instance, "there is a ready criterion with roots deep in the common law, of the minimal expectation of privacy that *exists*, and that is acknowledged as *reasonable*. To withdraw protection of this minimal expectation would permit police technology to erode the privacy guaranteed by the Fourth Amendment." *Id.*, at 34. (emphasis in original)

In view of the inherent danger of video surveillance techniques to unreasonably intrude upon personal privacy, the Ninth Circuit in *United States v. Nerber*, 222 F.3d 597, 603 (9th Cir. 2000), recognized the need for invasive investigative mechanisms to only be used in approved, limited circumstances. The court there stated:

> Hidden video surveillance is one of the most intrusive investigative mechanisms available to law enforcement. The sweeping, indiscriminate manner in which video surveillance can intrude upon us, regardless of where we are, dictates that its use be approved in only limited circumstances.

Nerber, 222 F.3d at 603.

The employment of sophisticated forms of electronic surveillance has, therefore, raised a novel legal question of whether, in this age of modern technology, the invited informant exception to the warrant requirement can still adequately protect against a violation of the Fourth Amendment. The Courts of Appeals have answered this question inconsistently and remain divided on whether the invited informant doctrine may properly be used, together with electronic monitoring of an individual's home or hotel room, without running afoul of the Fourth Amendment. The First and the Eleventh Circuits have reached opposite conclusions. The Ninth Circuit would appear to side with the First Circuit and with the dissent in this case.

In *United States v. Yonn*, 702 F.2d 1341 (11th Cir. 1983), the Eleventh Circuit held that the Fourth Amendment was not violated where agents placed a microphone in a motel room and monitored and recorded the defendant's conversations when a person who consented to the surveillance was present. The court

held that "location of the electronic equipment does not alter the inevitable fact that Yonn had no justifiable expectation of privacy in his conversation [with the consenting party]." *Yonn*, 702 F.2d at 1347.

On the other hand, in *United States v. Padilla*, 520 F.2d 526 (1st Cir. 1975), the First Circuit held that a defendant's Fourth Amendment rights were violated when agents placed an audio recording device in his hotel room, and with no judicial authorization for the surveillance, recorded conversations between the defendant and another person who consented to the recordings. Chief Judge Coffin explained that a permanent audio recording device placed in a hotel room was much more intrusive than a body recorder worn by an informant:

> The government's position would turn on its head the carefully tailored [party] exception to one's expectation of privacy. Electronic devices could be installed for lengthy periods of time without antecedent authority, so long as only a suspect's conversations with police agents were offered in evidence and the enforcement officials alleged nothing else was recorded. Under this approach a room or an entire hotel could be bugged permanently with impunity and with the hope that some usable conversations with agents would occur.

Padilla, 520 F.2d at 527-28.

A district court in the Eighth Circuit in *United States v. Shabazz*, 883 F. Supp. 422 (D. Minn. 1995) reached the same conclusion as the First Circuit. In *Shabazz*, audio and video evidence recorded in the presence of a consenting informant in the defendant's hotel room was suppressed. In reaching this

conclusion, the court made an important distinction between recording a conversation through a wired informant and the bugging of an entire dwelling, explaining:

> The emplacement of continuously operable transmission and recording devices is not the same as a conversation with a wired informant. When a conversant knows that the hearer is present, the information is freely given and the speaker bears the risk. On the other hand, if microphones and cameras are hidden in one's home and are operable even in the absence of the informant, then Big Brother is literally within the walls. Even if the devices are turned off when the informant is absent, the government, at its whim and ungoverned discretion, retains the capacity to invade the occupant's room. The government's option to surveil continues, even in the absence of the implicit consent shown when speaking to another person.

Shabazz, 883 F. Supp. at 425.

In *United States v. Nerber*, the informants brought the defendants to a hotel room in which the FBI had installed a hidden video camera without a warrant. The informants left the room and, for three hours thereafter, agents monitored the defendants' activities in the room. The Ninth Circuit affirmed the district court's order suppressing all evidence obtained after the informants left the room. The court noted:

> We do not intend to imply that video surveillance is justifiable whenever an informant is present. For example, we suspect an informant's presence and consent is insufficient to justify the warrantless

> installation of a hidden video camera in a suspect's home. We hold only that when defendants' privacy expectations were already substantially diminished by their presence in another person's room to conduct a brief business transaction, the presence and consent of the informants was sufficient to justify the surveillance.

Nerber, 222 F.3d at 604 n.5.

The courts in *Padilla*, *Shabazz* and *Nerber* correctly identified the inherent danger in hidden electronic monitoring, discussed by the Supreme Court in *Katz*, that such devices will expose those things that a suspect did not *knowingly* expose to the invited informant. Such monitoring is inherently suspect because of the inevitability, as this case illustrates, that it will permit the government to view sounds and images that were not perceived or intended to be perceived by the invited informant.

Accordingly, and as this Court's holding in *Kyllo* appears to suggest, the government must obtain a warrant prior to conducting sophisticated video surveillance between an individual and a consenting party. The *Kyllo* Court states, "Where . . . the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant." *Kyllo*, 533 U.S. at 40. In addition to requiring a warrant under such circumstances, *Kyllo* also requires the government to specify the method of surveillance at hand:

> We have said that the Fourth Amendment draws "a firm line at the entrance of the house[.]" That line, we think, must be not only firm but bright – which

> requires clear specification of those methods of surveillance that require a warrant.

Id., at 40, quoting, *Payton v. New York*, 445 U.S. 573, 590 (1980).

In the present case, the government did not apply for a warrant, much less specify to a detached judicial authority its intention to employ a remote-controlled video camera to monitor Lee. The simple fact is that the government should have applied for a search warrant in this case, rather than rely on the invited informant doctrine and the good faith efforts of an FBI agent inexperienced in privacy issues to attempt to comply with the doctrine. This Court in *Katz* reasoned:

> [T]he inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer. They were not required, before commencing the search, to present their estimate of probable cause to a neutral magistrate. They were not compelled, during the conduct of the search itself, to observe precise limits established in advance by a specific court order. Nor were they directed, after the search had been completed, to notify the authoring magistrate in detail of all that had been seized. In the absence of such safeguards, this Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end.

Katz, 389 U.S. at 356-57.

Similarly here, the dissent concluded that the government's self- imposed restraints were no substitute for its failure to obtain a warrant:

> I fail to see the significance of the government's self-imposed restraint here. Despite those self-imposed limitations, the fact remains that Agent Reilly had the ability to manipulate a video camera to see and hear practically everything that Lee did in the privacy of his hotel suite throughout the day and night. The limitations of that Orwellian capability were not subject to any court order. Rather, they were defined by the curiosity and scruples of a single agent. That is simply not adequate given the importance of Fourth Amendment guarantees.

(App. A at 39a)

The primary shortcoming in the Third Circuit's holding is its failure to recognize that the videotape evidence in this case exceeded the permissible scope of the invited informant exception to the warrant requirement under the well-recognized principles of *Hoffa*, *Katz* and their progeny. The majority's conclusion that the government's violations of that doctrine were not "material" in this case is inconsistent with well-established principles of Fourth Amendment jurisprudence, most recently articulated by Justice Antonin Scalia in *Kyllo v. United States*, *supra*. Accordingly, review of the Third Circuit's decision is warranted to clarify and resolve the conflict concerning the proper scope and application of the consenting party/invited informant doctrine to video surveillance of a suspect.

CONCLUSION

For all the foregoing reasons, petitioner Lee respectfully requests that this Court grant review in this matter.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED FEBRUARY 20, 2004

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 01-1629

UNITED STATES OF AMERICA

v.

ROBERT W. LEE, SR.,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

(D.C. Criminal No. 99-640-1)
District Court Judge: John W. Bissell, Jr.

Argued September 20, 2002

Before: SCIRICA, *Chief Judge*, and ALITO, and MCKEE, *Circuit Judges*.

(Opinion Filed: Februart 20, 2004)

OPINION OF THE COURT

Appendix A

ALITO, *Circuit Judge.*

This is an appeal by defendant Robert W. Lee, Sr. ("Lee") from a judgment in a criminal case. Lee was indicted on charges stemming from the alleged payment of bribes by boxing promoters to Lee and other officials of the International Boxing Federation ("IBF"). After a jury trial, Lee was convicted of one count of conspiracy to engage in money laundering, in violation of 18 U.S.C. § 1956(h); three counts of interstate travel in aid of racketeering, in violation of 18 U.S.C. § 1952 (the "Travel Act") and 18 U.S.C. § 2; and two counts of filing false tax returns, in violation of 26 U.S.C. § 7206. He was sentenced to a concurrent term of 22 months' imprisonment on each count and was fined $25,000.

In this appeal, Lee argues (1) that video tapes that show him receiving money from a confidential government informant violated his Fourth Amendment rights and should have been suppressed, (2) that the District Court misinstructed the jury concerning the meaning of the "duty of fidelity" under the New Jersey commercial bribery statute, N.J.S.A. 2C:21-10, (3) that his Travel Act and money laundering conspiracy convictions must be reversed because they are predicated upon the New Jersey commercial bribery statute, and there is an insufficient nexus between his conduct and New Jersey to permit the application of the New Jersey statute, (4) that his money laundering conviction should be reversed because the evidence at trial did not prove the existence of a single conspiracy, (5) that two of the Travel Act counts were impermissibly amended at trial, and (6) that the District Court erred when it imposed concurrent sentences of 22 months' imprisonment on the tax counts. We affirm.

Appendix A

I.

Lee was a cofounder and president of the IBF, an organization that crowns international boxing champions and publishes ratings of boxers within different weight divisions. The ratings are published monthly from the IBF headquarters in East Orange, New Jersey. The primary function of the ratings is to determine which boxers will fight in upcoming IBF championship bouts. During the period relevant to this appeal, Lee served on the IBF Executive Board and various IBF committees, including the championship committee, chaired by Don "Bill" Brennan, and the ratings committee, chaired by C. Douglas Beavers.

In May 1996, the Federal Bureau of Investigation received information that boxing promoters were paying certain IBF officials in order to receive more favorable IBF ratings for their boxers. Beavers was questioned and, in May of 1997, chose to cooperate with the FBI. He told investigators that he had solicited and received bribes from boxing promoters and that these bribes had been divided equally among himself, Brennan, Lee, and Lee's son, Robert W. Lee, Jr. ("Lee, Jr."). Beavers, who is based in Portsmouth, Virginia, further testified that he had held regular telephone conversations with Lee, who works out of the IBF headquarters in East Orange, regarding strategies for maximizing payment amounts, methods for laundering bribes that were received as checks,[1] and arrangements for Lee to

1. Because of the difficulty of transporting large amounts of cash from South America, bribes from South American promoters were sometimes received in the form of checks. These were either (Cont'd)

travel from New Jersey to Virginia to collect his share of the bribes.

With Beavers' cooperation, the FBI made audio and video recordings of three meetings between Beavers and Lee that took place in Portsmouth, Virginia, on June 9, 1997, December, 18, 1997 and October 21, 1998. The meetings were held in a hotel suite rented by Beavers for Lee in the Portsmouth Holiday Inn and were electronically monitored and recorded using equipment installed in the living room of the suite by the FBI prior to Lee's arrival. This equipment consisted of a concealed camera and microphone that transmitted video and audio signals to a monitor and recorder located in an adjacent room. The FBI did not obtain a warrant authorizing the installation or use of the equipment but instead relied on Beavers' consent. The government agents located in the room next to Lee's suite were instructed to monitor activity in the corridor to determine whether or not Beavers had entered Lee's rooms. The agents were further instructed to switch on the monitor and recorder only when Beavers was in the suite and that, at all other times, the monitor and recorder were to be switched off. During the December 1997 meeting, Beavers was recorded handing Lee cash that had originated as a bribe paid to the IBF's South American representative, Francisco "Pancho" Fernandez, by a Colombian boxing promoter, Billy Chams.

(Cont'd)
hand delivered or mailed to Beavers, who would then deposit the checks into a bank account belonging to the Portsmouth Athletic Club, a gymnasium owned by Beavers. Once the checks had cleared, Beavers would then retain his share and distribute the remainder of the bribe to Lee in the form of cash.

Appendix A

On November 4, 1999, a federal grand jury in the District of New Jersey indicted Lee, Lee, Jr., Brennan and Fernandez on 35 counts related to the receipt of bribes from boxing promoters. As noted, Lee Sr. was convicted on six counts but acquitted on the rest. Lee, Jr. was acquitted on all counts. The case against Brennan was dismissed because of his ill health and age, and Fernandez remains a fugitive outside the United States.

II.

A.

Lee challenges the District Court's admission into evidence of tapes of meetings in his hotel suite. Lee contends that the monitoring and recording of these meetings violated his Fourth Amendment rights because the government did not obtain a warrant. Lee's argument, however, is inconsistent with well-established Fourth Amendment precedent concerning the electronic monitoring of conversations with the consent of a participant.

In *United States v. Hoffa,* 385 U.S. 293 (1967), a confidential government informant named Partin met with the defendant in the defendant's hotel suite and elsewhere and testified about those conversations at trial. The defendant argued that Partin had conducted an illegal search for verbal evidence and that, because the defendant was unaware of Partin's role as an informant, the defendant had not validly consented to his entry into the suite. *Id.* at 300. The Supreme Court rejected this argument, holding that the defendant had "no interest legitimately protected by the Fourth

Amendment." *Id.* at 301-02. The Court concluded that the Fourth Amendment does not protect "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." *Id.* at 302.

Although *Hoffa* involved testimony about conversations and not electronic recordings of conversations, the Supreme Court in later cases drew no distinction between the two situations. *See United States v. Caceres*, 440 U.S. 741, 744 (1979); *United States v. White*, 401 U.S. 745, 752 (1971) (plurality). As the Court in *Caceres* put it,

> Concededly a police agent who conceals his police connections may write down for official use his conversations with a defendant and testify concerning them, without a warrant authorizing his encounters with the defendant and without otherwise violating the latter's Fourth Amendment rights. *Hoffa v. United States*, 385 U.S., at 300-303. For constitutional purposes, no different result is required if the agent instead of immediately reporting and transcribing his conversations with defendant, either (1) simultaneously records them with electronic equipment which he is carrying on his person; (2) or carries radio equipment which simultaneously transmits the conversations either to recording equipment located elsewhere or to other agents monitoring the transmitting frequency. . . .

440 U.S. at 750-51 (quoting *United States v. White*, 401 U.S. 745, 749 (1971)) (citation omitted). The Court added that it

had "repudiated any suggestion that [a] defendant had a 'constitutional right to rely on possible flaws in the agent's memory, or to challenge the agent's credibility without being beset by corroborating evidence that is not susceptible of impeachment.' " *Id.* at 750 (quoting *Lopez v. United States,* 373 U.S. 427, 439 (1963)). In short, the Court adopted the principle that, if a person consents to the presence at a meeting of another person who is willing to reveal what occurred, the Fourth Amendment permits the government to obtain and use the best available proof of what the latter person could have testified about. This principle appears to doom Lee's argument here.

Lee argues, however, that neither the Supreme Court nor our court has extended this principle to the circumstances present in this case. He points to three factors: (1) the agents used video rather than audio equipment; (2) the recording occurred in Lee's hotel room, a place where a person has a heightened expectation of privacy; and (3) the monitoring equipment remained in the room when Beavers was not present. In making this argument, Lee relies on the First Circuit's decision in *United States v. Padilla,* 520 F.2d 526, 527-28 (1st Cir.1975), which held that the defendant's Fourth Amendment rights were violated when agents placed an audio recording device in the defendant's hotel room and recorded conversations between the defendant and another person who consented to the recordings. In reaching this conclusion, the First Circuit expressed concern that if law enforcement officers were permitted to leave a monitoring or recording device in a hotel for a lengthy pe iod of time the officers would be tempted to monitor or record conversations that

occurred when no consenting participant was present. *Id.* As the Court put it,

> [t]he government's position would turn on its head the carefully tailored [consenting party] exception to . . . one's expectation of privacy. Electronic devices could be installed for lengthy periods of time without antecedent authority, so long as only a suspect's conversations with police agents were offered in evidence and the enforcement officials alleged that nothing else was recorded. Under this approach a room or an entire hotel could be bugged permanently with impunity and with the hope that some usable conversations with agents would occur.

Id. at 528. *See also United States v. Shabazz,* 883 F.Supp. 422 (D.Minn.1995) (audio and video recording).

In contrast to the First Circuit, the Second and Eleventh Circuits have held that the Fourth Amendment is not violated by the use of a fixed electronic device to record a meeting between a defendant and a person who consents to the recording. *United States v. Yonn,* 702 F.2d 1341, 1346-47 & n. 5 (11th Cir.1983); *United States v. Myers,* 692 F.2d 823 (2d Cir.1982). In *Myers,* a defendant was videotaped during a meeting with a government informant at a townhouse maintained by the FBI. *Id.* at 832. Rejecting the defendant's Fourth Amendment argument, the Court stated that the defendant's "conversations with undercover agents in whom he chose to confide were not privileged, and mechanical recordings of the sights and sounds to which the agents could have testified were proper evidence." *Id.* at 859.

In *Yonn*, the Eleventh Circuit likewise held that the Fourth Amendment was not violated when agents placed a microphone in a motel room and monitored and recorded the defendant's conversations when a person who consented to the surveillance was present. The Court held that "[t]he location of the electronic equipment does not alter the irrefutable fact that Yonn had no justifiable expectation of privacy in his conversation with [the person who consented]." 702 F.2d at 1347. The Court also specifically rejected the reasoning of *Padilla*, stating that it saw "no reason to suppress the recording of a clearly unprotected conversation merely because the monitoring technique employed poses a hypothetical risk that protected conversations may be intercepted." *Id.* at 1347 n. 5.

We have considered the concern expressed by the *Padilla* Court, but we remain convinced that the present case is governed by the well-established principle that a person has no legitimate expectation of privacy in conversations with a person who consents to the recording of the conversations. None of the three factors on which Lee relies appears to us to be sufficient to take this case beyond the reach of this principle.

First, we cannot distinguish this case on the ground that the recorded meetings occurred in a hotel suite. What is significant is not the type of room in which the surveillance occurred but Lee's action in admitting Beavers to the room. Although Lee had an expectation of privacy in the hotel suite so long as he was alone there, when Lee allowed Beavers to enter, any expectation of privacy vis-a-vis Beavers vanished. We note that in *Hoffa* many of the conversations also occurred

in a hotel suite, but the Court nevertheless held that the case did not involve any legitimate Fourth Amendment interest. 385 U.S. at 296.

Second, we cannot draw a constitutional distinction between consensual audio and video surveillance. The principle underlying the governing Supreme Court cases is that if a defendant consents to the presence of a person who could testify about a meeting and is willing to reveal what occurs, the defendant relinquishes any legitimate expectation of privacy with respect to anything that the testimony could cover. Thus, just as Lee gave up any expectation of privacy in the things that he allowed Beavers to hear, Lee also gave up any expectation of privacy in the things that he allowed Beavers to see. Although video surveillance may involve a greater intrusion on privacy than audio surveillance, the difference is not nearly as great as the difference between testimony about a conversation and audio recordings of conversations. As noted, however, the Supreme Court has not drawn any distinction between those two types of evidence, and we similarly see no constitutionally relevant distinction between audio and video surveillance in the present context.

Finally, we do not agree with the First Circuit that it is appropriate to suppress recordings of meetings between a defendant and a cooperating individual simply because the recording device was placed in the room rather than on the cooperating individual's person. To be sure, there are three circumstances in which this distinction would matter for Fourth Amendment purposes. First, if the defendant had an expectation of privacy in the premises at the time when the

device was installed, the entry to install the device would constitute a search. Second, the cases involving consensual monitoring do not apply if recordings are made when the cooperating individual is not present. Third, the logic of those cases is likewise inapplicable if the placement of the recording device permits it to pick up evidence that the cooperating individual could not have heard or seen while in the room. Unless one of these circumstances is present, however, it does not matter for Fourth Amendment purposes whether the device is placed in the room or carried on the person of the cooperating individual. In either event, the recording will not gather any evidence other than that about which the cooperating witness could have testified.

As the government argues, the decision in *Padilla* appears to be based, not on the conclusion that the recordings in that case had been obtained in violation of the Fourth Amendment, but on a prophylactic rule designed to stamp out a law enforcement technique that the Court viewed as creating an unacceptable risk of abuse. Even assuming for the sake of argument that we have the authority to adopt such a rule,[2] however, we would not do so. Although *Padilla* was decided more than a quarter century ago and has not been followed in any other circuit, we are not aware of evidence that the installation of recording devices to monitor meetings attended by a cooperating individual has led to the sort of abuse that the *Padilla* Court feared. Nor is it intuitively obvious that there is much risk of such abuse. As noted, the *Padilla* Court feared that law enforcement agents would install electronic devices in a hotel rooms and monitor what

2. *But see United States v. Payner,* 447 U.S. 727, 735-36 & n. 8 (1980).

occurred "in the hope that some usable conversations with agents would occur." 520 F.2d at 527-28. However, there are numerous reasons to doubt whether law enforcement is likely to find this an alluring strategy.

First, a person who illegally intercepts wire, oral, or electronic communicates is subject to criminal and civil penalties, *see* 18 U.S.C. §§ 2511, 2520, and a federal agent who violates the Fourth Amendment may be sued under *Bivens v. Six Unknown Fed. Narcotics Agents,* 403 U.S. 388 (1971). Second, in order to install a monitoring device, law enforcement authorities or a person cooperating with them must acquire a right to enter the premises, such as by obtaining a warrant or renting the premises in which the device is to be installed. Thus, the *Padilla* Court's fear that agents might bug "an entire hotel," 520 F.2d at 528, and the fear of the District Court in *Shabazz* that devices could be placed in a person's home, *see* 883 F.Supp. at 425, seem misplaced. Third, it is not clear that law enforcement would have much to gain from monitoring conversations that occur when a cooperating individual is not present. A video tape of a conversation generally reveals whether a cooperating individual is present, and without proof of the presence of the cooperating individual, the tape is inadmissible. We do not go so far as to say that there is no risk of the type of abuse that worried that *Padilla* Court, but the risk is not great enough to justify the holding of the *Padilla* Court.

In the present case, there was no violation of Lee's Fourth Amendment rights. The monitoring devices were installed in the suite's living room at a time when Lee had no expectation of privacy in the premises. There is no evidence

that conversations were monitored when Beavers was absent from the room, and Beavers was plainly there at the time of the incriminating meetings shown on the tapes that were introduced at Lee's trial. We are satisfied that the tapes do not depict anything material that Beavers himself was not in a position to hear or see while in the room. Finally, we reject Lee's suggestion that the government was required, before resorting to video surveillance, to demonstrate that less intrusive investigative techniques were unlikely to succeed. Although this requirement applies to monitoring governed by the federal wiretapping statute, 18 U.S.C. § 2518(3)(c), that statute does not apply to electronic surveillance conducted with the prior consent of a party to the communication. Similarly, judicial decisions considering a similar requirement in cases involving silent video surveillance conducted without a participant's consent, see *United States v. Williams,* 124 F.3d 411, 416 & n. 5 (3d Cir.1997), are inapplicable in this context. We therefore reject Lee's argument that the tapes should have been suppressed.

B.

Lee next contends that the District Court misinstructed the jury regarding the elements of commercial bribery under the New Jersey Commercial bribery statute, N.J.S.A. § 2C:21-10, which figured in four of the counts on which Lee was convicted, i.e., the three counts of interstate travel in aid of racketeering and the money laundering conspiracy count.[3] Our "[r]eview of the legal standard enunciated in a

3. The Travel Act counts charged that he traveled in interstate commerce with the intent to promote, manage, establish, carry on (Cont'd)

jury instruction is plenary," *United States v. Yeaman*, 194 F.3d 442, 452 (3d Cir.1999), "but review of the wording of the instruction, *i.e.*, the expression, is for abuse of discretion." *Id.* "This Court reviews jury instructions to determine whether, 'taken as a whole, they properly apprized the jury of the issues and the applicable law.' " *Id.* (quoting *Dressler v. Busch Entertainment Corp.*, 143 F.3d 778, 780 (3d Cir.1998)).

The New Jersey commercial bribery statute provides in relevant part as follows:

> A person commits a crime if he solicits, accepts or agrees to accept any benefit *as consideration for* knowingly violating or agreeing to violate *a duty of fidelity* to which he is subject as . . . An officer, director, manager or other participant in the direction of the affairs of an incorporated or unincorporated association. . . .

N.J.S.A. § 2C:21-10a (emphasis added).

(Cont'd)

and facilitate the promotion, management, establishment and carrying on of commercial bribery in violation of the New Jersey bribery statute. The relevant part of the money laundering conspiracy count charged that Lee and the other alleged conspirators conspired to commit the offense of engaging in financial transactions involving proceeds derived from violations of the New Jersey commercial bribery statute while knowing that these proceeds were derived from such violations and that the financial transactions were designed at least in part to conceal and disguise the nature, location, source, ownership, and control of the proceeds.

Appendix A

The District Court instructed the jury that the three elements needed in order to establish a violation of the New Jersey commercial bribery statute are:

> First, that the defendant solicited, accepted or agreed to accept a benefit;
>
> Second, that the defendant did so in consideration for knowingly violating or agreeing to violate a duty of fidelity;
>
> Third, that the defendant owed that duty of fidelity because he is either an officer, a director, a manager or other participant in the direction of the affairs of an incorporated or unincorporated association.

Joint App. at 3788. This was a straightforward and accurate statement of the elements of N.J.S.A. § 2C:21-10a.

The Court further instructed the jury as to the meaning of a "duty of fidelity," stating:

> A person who owes a duty of fidelity or loyalty may not engage in self- dealing or otherwise use his or her position to further personal interests rather than those of the beneficiary. For example officers and directors have a duty not to engage in self-dealing to further their own personal interests rather than the interests of the corporation.

. . . . .

> The duty of loyalty or fidelity may also arise based on the existence of a contractual relationship between a defendant such as Mr. Lee, Sr. and the corporation such as the IBF. A contract creates a duty between the contracting parties to adhere to the terms of the contract, and those terms may include or encompass a duty of fidelity. A director or officer's failure to abide by the terms of his contract with a corporation could, if you so find, be a breach of his duty of loyalty to the corporation.

Joint App. at 3790-91.

Pointing to these latter instructions, Lee contends that the District Court erred by telling the jury (1) that a person can breach a "duty of fidelity" merely by engaging in self-dealing and (2) that a breach of an employment contract is a *per se* breach of a duty of fidelity. We disagree. Lee first argues that the District Court went astray in instructing the jury that any act of self-dealing by a corporate officer constitutes a breach of a duty of loyalty. According to Lee, the New Jersey commercial bribery statute reaches only "those specific duties of the actor 'to which he is subject' as a director, manager, etc. *of the specific corporation at issue, not to generic, vague, undefined corporate duties,* such as a duty to refrain from 'self-dealing.'" Appellant's Br. at 32 (emphasis added). However, Lee cites no New Jersey case law that supports this interpretation of N.J.S.A. § 2C:21-10a; we are not aware of any such authority; and the jury

instruction in question seems to be an accurate interpretation of the statutory language. Moreover, in light of the nature of the breach alleged in this case (accepting bribes in exchange for rigging the ratings of boxers) any failure to draw the *205 fine distinction suggested by Lee (between "specific" and "generic" corporate duties) was harmless.

Lee next maintains that the instructions regarding the "duty of fidelity" were flawed because the jury could have interpreted them to mean that proof that he breached this duty was alone sufficient to establish that he violated N.J.S.A. § 2C:21-10a. Lee's argument is not convincing. The Court's discussion of the meaning of a "duty of fidelity" was delivered immediately after its careful explanation of the three elements that were necessary for the jury to convict Lee of violating N.J.S.A. § 2C:21-10a, and one of these elements was that "the defendant [received a benefit] in consideration for knowingly violating or agreeing to violate a duty of fidelity." Joint App. at 3788. Thus, the District Court did not read the element of consideration out of the statute.

Finally, Lee suggests that the District Court told that jury that a breach of contract is *per se* a breach of a duty of fidelity, Appellant's Br. at 33, but the District Court said no such thing. Rather, the Court said only that a duty of loyalty or fidelity "*may . . . arise* based on the existence of a contractual relationship between a defendant such as Mr. Lee, Sr. and the corporation such as the IBF" and that "[a] director or officer's failure to abide by the terms of his contract with a corporation *could, if you so find, be* a breach of his duty of loyalty to the corporation." Joint App. at 3791 (emphasis added). We are convinced that the jury instructions, read in

their entirety, "properly apprized the jury of the issues and the applicable law." *Yeaman,* 194 F.3d at 452.

C.

Lee next contends that his convictions for interstate travel in aid of racketeering and for conspiracy to engage in money laundering violated his rights to due process.[4] Asserting that those convictions were predicated on violations of the New Jersey commercial bribery statute, Lee argues that "the connections between the conduct underlying [those counts] and the State of New Jersey [were] tenuous at best" and that the application of the New Jersey statute to the conduct at issue would violate due process.[5] Appellant's Br. at 39.

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4. At one point in his brief, Lee claims that the application of the New Jersey commercial bribery statute to the conduct charged in the counts at issue also violated his right to the equal protection of the laws, but his brief makes no attempt to explain what this invocation of the Equal Protection Clause adds to his due process argument. We are therefore unable to assess any independent equal protection argument regarding the New Jersey commercial bribery statute.

5. We understand the question before us to be exclusively one of federal constitutional law, not state law. Specifically, we understand the question to be whether the conduct at issue is sufficiently tied to the State of New Jersey to permit that state to regulate that conduct without violating the federal Constitution. The state-law question of whether the conduct at issue is sufficiently tied to the state to bring the conduct within the scope of the state commercial bribery statute has not been developed in Lee's briefs, and we do not regard that question as before us in this appeal. Lee's brief does refer to the

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Lee contends that "the vast majority of the conduct constituting 'commercial bribery' took place outside the state of New Jersey in states that either do not consider such conduct a crime, or do not consider it as serious a criminal offense as New Jersey does." Appellant's Br. at 36. He notes that the bribe money was handed to him by Beavers in Virginia and that the agreements between Beavers and Fernandez, the IBF's South American representative, were made outside of New Jersey. Lee's arguments are not persuasive.

"Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if [the defendant] had been present [in the state] at the effect." *Strassheim v. Daily,* 221 U.S. 280, 284 (1911). *See also United States v. Woodward,* 149 F.3d 46, 66 (1st Cir.1998).[6] *Cf.* Model Penal

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New Jersey statute that specifies the territorial reach of the state's criminal laws, N.J.S.A. 2C1-3, but Lee makes no attempt to argue that the conduct at issue here does not fall within this provision. In particular, Lee does not explain why the conduct at issue in this case does not fall within N.J.S.A. § 2C:1-3a(1), which provides that "a person may be convicted under [New Jersey law] if . . . [e]ither the conduct which is an element of the offense or the result which is such an element occurs within this State." Instead, of addressing this question, Lee's brief quickly notes that this statute "is itself subject to constitutional review where extra-territorial application of New Jersey law would violate the due process clause of the United States Constitution." Appellant's Br. at 38-39.

6. Lee relies on *BMW of North America, Inc. v. Gore,* 517 U.S. 559 (1996), and *Healy v. Beer Institute, Inc.,* 491 U.S. 324 (1989),
(Cont'd)

Code § 1.03. In this case, both the purpose and the effect of the commercial bribery was to cause the IBF, which has its principal place of business in New Jersey, to alter its rankings of boxers. Thus, the conduct in question had effects within New Jersey: it tended to harm a business headquartered in the state and to produce attendant consequences there. These effects are sufficient to permit the state to regulate the conduct without violating due process.

The First Circuit's decision in *United States v. Woodward, supra,* supports this conclusion. In *Woodward,* a member of the Massachusetts Legislature accepted gratuities in Florida and was convicted under the Travel Act of traveling in interstate commerce with the intent to promote the offense of commercial bribery, in violation of the Massachusetts statute. The First Circuit held that the potential effect on Massachusetts when one of its legislators accepts gratuities

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but we do not find those cases to be apposite. Pointing to, among other things, the restrictions imposed by the dormant Commerce Clause, the Court in *BMW* held that a state court's award of punitive damages "must be supported by the State's interest in protecting its own consumers and its own economy." *Id.* at 572. Lee does not make a make a dormant Commerce Clause argument here, and in any event, *BMW* does not preclude a state from basing an award of punitive damages on conduct that occurs outside the state but that has a sufficient effect on the state's "own consumers and its own economy." *Id.*

Healy held that a state law concerning beer prices violated the dormant Commerce Clause. As noted, Lee does not make a dormant Commerce Clause argument here, and therefore we do not address that issue.

in another state was sufficient to satisfy the "effects test" set out in *Strassheim*. 149 F.3d at 67-68.

Lee attempts to distinguish *Woodward* by arguing that the conduct of the defendant in that case created a potential for harm that was unique to his own state (because he was a member of that state's legislature), whereas the effects of Lee's conduct "were no greater in New Jersey than they were in any other state." Reply Br. at 12. However, the effects within a state of extraterritorial conduct need not be unique to that state in order to justify the exercise of jurisdiction. The effects need only be of sufficient magnitude, and while the effects-test argument was stronger in *Woodward* than it is here, the effects here were adequate. Moreover, we note that, contrary to Lee's suggestion, his conduct did create the potential for special harm in New Jersey because that is where the IBF is headquartered and publishes its rankings. We thus hold that Lee's convictions on the counts in question did not violate due process.

D.

Lee contends that the government failed to prove the existence of a single conspiracy to engage in money laundering, as charged in the indictment,[7] and merely proved

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7. Count 27 of the Superceding Indictment provides, in relevant part:

> From in or about December 1990, through in or about November 1997, in the district of New Jersey, and elsewhere, defendant ROBERT W. LEE, SR., and

the existence of a series of unrelated conspiracies between different boxing promoters and individual officers of the IBF. Lee argues that his conviction for conspiracy to engage in money laundering should therefore be reversed. We reject this argument.

We exercise plenary review over "whether there was sufficient evidence from which the jury could have concluded that the government proved the single conspiracy alleged in the indictment." *United States v. Kelly,* 892 F.2d 255, 258 (3d Cir.1989). In reviewing the sufficiency of the evidence after conviction, we must view the evidence in the light most favorable to the verdict. *Id.* Where a single conspiracy is alleged in an indictment, and the evidence at trial merely

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> separately charged Don Brennan, a/k/a/ "Bill", and separately charged Francisco Fernandez, a/k/a/ "Pancho," a/k/a "Pacho," and others conspired to violate Title 18, United States Code, Section 1956(a)(1), that is, knowing that the property involved in financial transactions represented the proceeds of some form of unlawful activity, conducted and attempted to conduct financial transactions, which in fact, involved the proceeds of specified unlawful activity, namely, bribery, contrary to N.J.A.C. §§ 2C:21-10(a)(4) and 2C:21-10(b).
>
> b. knowing that the transaction was designed in whole and in part to disguise the nature, location, source, ownership and control of the proceeds of specified unlawful activity, namely, bribery, contrary to N.J.A.C. §§ 2C:21-10(a)(4) and 2C:21-11(b).

Joint App. at 120.

proves the existence of several distinct conspiracies, there is an impermissible variance. *Id.* On the other hand, "a finding of a master conspiracy with subschemes does not constitute a finding of multiple, unrelated conspiracies and, therefore, would not create an impermissible variance." *Id.* (quoting *United States v. Smith,* 789 F.2d 196, 200 (3d Cir.1986)). In *Kelly,* we adopted a three-step inquiry to distinguish a single conspiracy from a series of separate, unrelated conspiracies:

> First, we examine whether there was a common goal among the conspirators. Second, we look at the nature of the scheme to determine whether the agreement contemplated bringing to pass a continuous result that will not continue without the continuous cooperation of the conspirators. Third, we examine the extent to which the participants overlap in the various dealings.

Id. at 259 (citations and quotation marks omitted).

Application of the *Kelly* inquiry shows that the jury had a reasonable basis for concluding that what Lee alleges were four separate conspiracies was in fact part of the same overarching conspiracy to launder the proceeds of the bribes paid to Lee and other IBF officials.[8] The first step of the *Kelly* inquiry is satisfied because Lee, Lee Jr., Brennan and

8. Two of the allegedly separate conspiracies involved payments by Colombian boxing promoters to Fernandez and then to Beavers. The two remaining conspiracies involved direct payments by U.S. boxing promoters to Lee and Beavers.

Fernandez shared a common goal, namely, to receive shares of the payments from boxing promoters. The second step in the *Kelly* inquiry—that the co-conspirators each acted to bring about a continuous result that would not have continued but for their continuing cooperation—is also met because the participants continuously cooperated in their receipt of bribes, in the laundering of checks, and in the distribution of proceeds between themselves. For example, Lee held several conversations with Beavers regarding the risks of receiving bribes in the form of checks, and Beavers deposited checks that he had received from Fernandez into the bank account belonging to the Portsmouth Athletic Club and then distributed part of the proceeds to Lee. Finally, there was sufficient evidence to show that the participants overlapped in the various dealings, in satisfaction of the third *Kelly* factor. In establishing this third factor, the government is not required to "prove that each defendant knew all the details, goals, or other participants in order to find a single conspiracy." *Id.* at 260 (internal quotation marks and citations omitted). Evidence was presented at trial that Lee participated in each of the four supposedly separate schemes, Beavers was directly implicated in three,[9] and Fernandez was directly implicated in two.

In sum, there was sufficient evidence, when viewed in the light most favorable to the government, from which the jury could have concluded that there was a single conspiracy, as opposed to a series of unrelated smaller agreements between the participants.

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9. He either received money from Fernandez or directly from a boxing promoter.

Appendix A

E.

Lee contends that the two of the Travel Act counts of the indictment were improperly amended at trial. We exercise plenary review over a claim that an indictment was impermissibly amended. *United States v. Asher,* 854 F.2d 1483, 1497-98 (3d Cir.1988). "In order to rise to the level of an impermissible amendment, a variance must act to modify the indictment so that the defendant is convicted of a crime that involves elements distinct from those of the crimes with which he was originally charged." *Id.* at 1497. "Thus, where trial evidence [has] amended the indictment by *broadening* the possible bases for conviction from that which appeared in the indictment, the variance violates the defendant's substantial right to be tried only on charges returned by a grand jury." *Id.* (citations and quotation marks omitted, emphasis and alteration in original). "If, on the other hand, the variance does not alter the elements of the offense charged, [courts] focus upon whether or not there has been prejudice to the defendant." *Id.* (alteration in original).

Counts 21 and 23 of the indictment included the following language:

> On or about the following dates, in the district of New Jersey, and elsewhere, the below-named defendants did knowingly and wilfully travel in interstate and foreign commerce as described below, with intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of an unlawful

activity, that is, bribery, contrary to N.J.S.A. 2C:21-10(a)(4) and 2C:21-10(b), and thereafter did perform, and cause the performance of an act to promote, manage, establish, carry on and facilitate the promotion, management, and carrying on of said unlawful activity.

. . . . .

Count	Date	Defendants From/To
21	*11/97*	*Lee, Sr.* *Colombia to Virginia*
23	*6/98*	*Lee, Sr.* *Colombia to Virginia.* *Appellee's* Supp.App. at 64-65 (emphasis added).

In violation of Title 18, United States Code, Sections 1952 and 2.

Appellee's Supp.App. at 64-65 (emphasis added).

Lee contends that his conviction under these counts should be overturned because the government impermissibly amended the indictment by presenting evidence at trial, not that *he* traveled from "Colombia to Virginia" on or about "11/97" and "5/98," as the indictment charged, but that Fernandez made those trips. We disagree.

Lee's argument ignores the fact that Counts 21 and 23 charge that the alleged conduct violated "Title 18, United States Code, Sections 1952 *and 2*," Appellee's Supp.App. at 65 (emphasis added), and under 18 U.S.C. § 2 Lee could be held liable as a principal for Fernandez's travel in interstate or foreign commerce if Lee aided, abetted, counseled, commanded, induced, procured, or wilfully caused Fernandez to engage in that conduct. We have previously noted that criminal indictments are to be read "as a whole and interpret[ed] in a common sense manner." *Gov't of Virgin Islands v. Moolenaar,* 133 F.3d 246, 250 (3d Cir.1998).[10] Accordingly, even though Counts 21 and 23 of Lee's indictment could perhaps have been more carefully drafted, it is apparent that these counts apply both to travel in aid of racketeering by Lee himself, acting as principal, and to Lee's aiding and abetting the travel in aid of racketeering of another unnamed individual or individuals. The evidence presented at trial showed that Lee aided and abetted Fernandez's travel to and from Colombia but did not show such travel by Lee. The elements of the offense charged in Lee's indictment were therefore narrowed at trial. Accordingly, we look to whether Lee suffered any prejudice. *Asher,* 854 F.2d at 1497. The indictment charged Lee with aiding and abetting travel between Colombia and Virginia by an unnamed individual on or about November of 1997 and June of 1998. Evidence at trial showed that Fernandez, the IBF's South American representative and Lee's co-indictee, was the unnamed individual that Lee had aided and abetted in his travels

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10. *Moolenaar* dealt with an information, as opposed to an indictment, but stressed that for the purpose of assessing the permissibility of amendments at trial, an information and an indictment should be treated in the same manner. 133 F.3d at 248.

between Colombia and Virginia during these months. We cannot believe Lee was prejudiced by this narrowing of the government's theory at trial.

F.

Lee's last argument is that the District Court erred when it sentenced him to concurrent terms of 22 months' imprisonment on the two tax counts, which charged violations of 26 U.S.C. § 7206. Because Lee did not raise this argument in the District Court, we review for plain error. *United States v. Gricco,* 277 F.3d 339, 350 (3d Cir.2002).

Title 26, United States Code Section 7206 provides that any violation may be punished by a fine of "not more than $100,000 . . . or imprison [ment for] not more than 3 years." 26 U.S.C. § 7206. Section 3D1.2 of the Sentencing Guidelines directs a sentencing court to group "[a]ll counts involving substantially the same harm," and Section 5G1.2(b) of the Guidelines instructs a court to apply the same sentence to each count in the same group, unless the statutorily authorized maximum for that count is less than the minimum of the guideline range or the statutory minimum is greater than the maximum of the guideline range. U.S.S.G. § 5G1.2(b) (referring to §§ 5G1.1(a) and (b)). At the sentencing hearing, the District Court determined the offense level for Lee's money laundering and Travel Act offenses to be 16 and the offense level for his tax convictions to be seven. Joint App. at 3646-48. The Court did not commit plain error when it grouped these offenses. The Court proceeded to identify a guideline range of 21 to 27 months, based on an offense level of 16 and Lee's criminal history category of I.

Id. at 6. The Court then imposed concurrent sentences of 22 months on all six counts. *Id.* at 3700. Because the statutory maximum for Lee's tax offenses, 3 years, is not less than the minimum guideline range of 21 months, and because there was no mandatory minimum term of imprisonment for those offenses, the District Court did not commit plain error when it imposed the same concurrent 22-month sentence on all counts.

III.

For the reasons explained above, we affirm the judgment of the District Court.

Appendix A

McKEE, *Circuit Judge*, dissenting.

"What a person *knowingly* exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz v. United States*, 389 U.S. 347, 351 (1967) (emphasis added). Today my colleagues stretch that rule to include personal effects that a person *unknowingly* exposes to the public. Accordingly, I must respectfully dissent from the majority's rejection of Lee's Fourth Amendment claim.

I. BACKGROUND

The FBI rented a hotel suite for Lee in June and December of 1997. The suite consisted of "a sitting room and kitchenette, from which one could walk through a continuously open door, into a bedroom, which also had a bathroom in it." A496-97. C. Douglas Beavers, the government's cooperating witness, rented the hotel suite in Lee's name on behalf of the government and kept a key for himself. However, both Lee and Beavers treated the suite as if it was exclusively Lee's hotel room.

With Beavers' consent, the FBI concealed a video camera and microphone in the suite after Beavers rented it. The camera could swivel 360 degrees and transmit video images from the living room area and part of the bedroom area of Lee's suite 24 hours a day. Special Agent Reilly of the FBI monitored the hidden surveillance equipment from an adjacent hotel room the government had rented for that purpose. Reilly could remotely control the camera and equipment in Lee's suite from her location in the adjoining

room. The equipment in Lee's room continuously transmitted video and audio to the receiving equipment operated by Agent Reilly although she could not receive or record those transmissions unless her equipment was turned on. Agent Reilly testified without contradiction that she did not turn her equipment on or monitor any of the transmissions from Lee's suite unless Beavers was in the suite with Lee. However, the camera could scan and focus on different areas of Lee's suite whether or not Beavers was there. *See* Reply Br. at 4 n. 1.

When Beavers visited Lee, he also wore a "body wire" capable of sending audio transmissions to the equipment in Agent Reilly's adjoining room. However, Beavers' body transmitter apparently malfunctioned and the FBI was only able to monitor and record audio transmissions by utilizing the microphone and camera hidden inside Lee's suite. The audio and video recordings that resulted from this surveillance constituted the primary evidence for the only counts on which Lee was convicted.

The Government argues that "Beavers' view of the room was unobstructed, and he could look around the room at will. Nothing was concealed from Beavers that was visible to the camera." *See* Appellee's Br. at 28. However, that claim is not supported by this record, and the district court did not focus on that aspect of Lee's argument. Instead, it found that Lee had no expectation of privacy in his hotel suite because he admitted Beavers to the room, and Beavers' presence negated Lee's Fourth Amendment expectation of privacy under *Hoffa v. United States,* 385 U.S. 293 (1966). A498.

Appendix A

II. DISCUSSION

A. *Katz* and *Hoffa*

The Supreme Court first addressed the tension between law enforcement's use of technology and the Fourth Amendment's guarantee of privacy in *Katz v. United States*, 389 U.S. 347 (1967). There, FBI agents attached an electronic device to the outside of a public telephone booth that Katz was suspected of using for gambling-related telephone calls. The device allowed the FBI to surreptitiously listen to Katz's end of telephone conversations. Based primarily upon evidence obtained from monitoring those calls, Katz was subsequently convicted of using the telephone for interstate transmission of gambling information in violation of 18 U.S.C. § 1084. Following his conviction, Katz appealed the trial court's denial of his motion to suppress evidence derived from the electronic interception of his telephone conversations.

The Supreme Court concluded that Katz's expectation of privacy in the content of his calls was reasonable even though he was standing in a public telephone booth in full view of everyone passing by, and that the electronic interception of his telephone calls constituted a "seizure" under the Fourth Amendment even though it was accomplished without physically invading the place where the monitoring occurred. Therefore, absent exigencies that were not present, the seizure was subject to the warrant requirement of the Fourth Amendment. The Court explained:

> [B]ypassing a neutral predetermination of the *scope* of a search leaves individuals secure from

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> Fourth Amendment violations only in the discretion of the police.
>
> These considerations do not vanish when the search in question is transferred from the setting of a home, an office, or a hotel room to that of a telephone booth. Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures. The government agents here ignored the procedure of antecedent justification ... that is central to the Fourth Amendment, a procedure that we hold to be a constitutional precondition of the kind of electronic surveillance involved in this case. Because the surveillance here failed to meet that condition, and because it led to the petitioner's conviction, the judgment must be reversed.

389 U.S. at 358-59 (internal quotation marks and citations omitted).

The majority relies upon *Hoffa v. United States,* 385 U.S. 293 (1966), in concluding that Lee's expectation of privacy inside the intimacy of his hotel suite was not reasonable. However, on this record, that is an unjustified and unsupportable extension of *Hoffa* and its progeny.

The defendant in *Hoffa* was convicted of jury tampering based primarily upon the testimony of Edwin Partin, an official of a Teamsters Union local in Nashville, Tennessee, where Hoffa and other union officials were on trial for violating the Taft-Hartley Act. During the course of that trial,

the government became concerned that Hoffa and his codefendants might attempt to bribe some of the jurors. Unbeknownst to Hoffa, the government recruited Partin to gather evidence of jury tampering. Partin was able to visit Hoffa's hotel suite and Hoffa spoke freely of attempting to bribe jurors in his presence. Hoffa's trial for Taft-Hartley violations ended with a hung jury, but Hoffa was thereafter convicted of jury tampering based largely on Partin's testimony about statements Hoffa had made in his hotel suite.[11] Hoffa appealed arguing in part that Partin's testimony should have been suppressed because it was obtained in violation of the Fourth Amendment. Hoffa argued that Partin's failure to disclose that he was "a government informer vitiated the consent that [Hoffa] gave to Partin's repeated entries into the [hotel] suite, and that by listening to [Hoffa's] statements Partin conducted an illegal 'search' for verbal evidence." 385 U.S. at 300.

The *Hoffa* Court began its analysis by conceding that the legal predicate of Hoffa's argument rested on solid ground.

> A hotel room can clearly be the object of Fourth Amendment protection as much as a home or office. . . . The Fourth Amendment can certainly be violated by guileful . . . intrusions into a constitutionally protected area. . . . And the protections of the Fourth Amendment are surely

11. The government's evidence at the jury tampering trial consisted primarily of Partin's testimony about statements he heard Hoffa make while in Hoffa's hotel room during the first trial.

> not limited to tangibles, but can extend as well to oral statements.

Id. at 301. The Court explained:

> The Fourth Amendment protects . . . the security a man relies upon when he places himself or his property within a constitutionally protected area, be it his home or his office, his hotel room or his automobile. There he is protected from unwarranted governmental intrusion. And when he puts something in his filing cabinet, in his desk drawer, or in his pocket, he has the right to know it will be secure from an unreasonable search or an unreasonable seizure.

Id. (footnote omitted). However, the Court rejected the balance of Hoffa's argument because Hoffa's disclosures resulted from his relationship with Partin, not any reliance on the privacy of his hotel suite. Thus, there was no reasonable expectation of privacy in the contents of the statements made to Partin, and no Fourth Amendment privacy interest prevented Partin from testifying about Hoffa's "confidential" statements. The Court explained:

> It is obvious that [Hoffa] was not relying on the security of his hotel suite when he made the incriminating statements to Partin or in Partin's presence. Partin did not enter the suite by force or by stealth. He was not a surreptitious eavesdropper. Partin was in the suite by invitation, and every conversation which he heard was either

> directed to him or knowingly carried on in his presence. The petitioner, in a word, was not relying on the security of the hotel room; he was relying upon his misplaced confidence that Partin would not reveal his wrongdoing.

Id. at 302, 87 S.Ct. 408.

The same is true here, but only to a point, and it is this limitation that the majority ignores in allowing *Hoffa* to swallow *Katz* on this record, and gulp down the Fourth Amendment in the process. Under the majority's *Hoffa* analysis, once Lee allowed Beavers to enter the suite, Lee no longer had a reasonable expectation of privacy and *Katz* becomes irrelevant. I disagree.

Hoffa teaches that one's expectation of privacy is compromised, and therefore unreasonable, to the extent that he or she confides in a confederate because the speaker is assuming the risk that the confederate may subsequently betray the speaker's trust and repeat anything communicated in "private." The same logic dictates that one has no reasonable expectation in the privacy of anything he/she *knowingly* allows the confederate to see in the presumed privacy of a home or hotel room, or elsewhere.[12] As noted above, the government concealed a microphone and video camera in the sitting room area inside Lee's hotel suite. From that vantage point, the government was capable of monitoring

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12. This has been referred to as the "invited informant" doctrine. *See, e.g., United States v. Nerber,* 222 F.3d 597, 605 n. 10 (9th Cir.2000). For convenience, I will use that phrase throughout my discussion.

Lee's activity inside his suite 24 hours a day by way of audio and video transmissions to Agent Reilly in the adjoining room.

The government maintains that it took steps to insure Lee's privacy and to guarantee that its actions were consistent with the pronouncements in *Hoffa*. It argues that Agent Reilly did not start monitoring the transmissions from Lee's suite until Beavers arrived, that she turned the equipment off when Beavers left, and that she did not turn it on in Beavers' absence. My colleagues conclude that this restraint was consistent with Lee's expectation of privacy under *Hoffa*, and therefore no Fourth Amendment violation occurred. In doing so, my colleagues ignore the fact that the Court in *Katz* rejected that very argument.

The Court in *Katz* began its analysis by noting the restrained manner in which the government had obtained the evidence there.

> [T]he surveillance was limited, both in scope and in duration, to the specific purpose of establishing the contents of petitioner's unlawful telephonic communications. The agents confined the surveillance to the brief periods during which he used the telephone booth and they took great care to overhear only the conversations of the petitioner himself.

389 U.S. at 354 (footnotes omitted). Accordingly, there, as here, the actual surveillance had been conducted "in an entirely defensible manner[.]" *Id.* There, as here, "[i]t [was]

apparent that the agents . . . acted with restraint" *Id.* at 356, 88 S.Ct. 507. Nevertheless, the Court concluded that this self-imposed restraint could not legitimize the warrantless seizure of Katz's conversations in the public telephone booth. The Court reasoned:

> [T]he inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer. They were not required, before commencing the search, to present their estimate of probable cause for detached scrutiny to a neutral magistrate. They were not compelled, during the conduct of the search itself, to observe precise limits established in advance by a specific court order. Nor were they directed, after the search had been completed, to notify the authoring magistrate in detail of all that had been seized. *In the absence of such safeguards, this Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end.*

Id. at 356-57 (emphasis added).

Accordingly, I fail to see the significance of the government's self-imposed restraint here. Despite those self-imposed limitations, the fact remains that Agent Reilly had the ability to manipulate a video camera to see and hear practically everything that Lee did in the privacy of his hotel suite throughout the day and night. The limitations of that

Orwellian capability were not subject to any court order. Rather, they were defined by the curiosity and scruples of a single agent. That is simply not adequate given the importance of Fourth Amendment guarantees.

> If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be secure in their persons, houses, papers and effects, only in the discretion of the police.

Terry v. Ohio, 392 U.S. 1, 22 (1968) (internal quotation marks and citation omitted).

Moreover, the agents in *Katz* did not even initiate their electronic monitoring "until investigation of the [defendant's] activities established a strong probability that he was using the telephone in question [for interstate gambling purposes]." 389 U.S. at 354. Here, there is no such representation. In fact, it is clear that Lee was not using the hotel suite for illegal purposes before the government installed microphones and cameras there and arranged for him to occupy it.

The government attempts to negate the reasonableness of Lee's expectation of privacy by suggesting that, since Lee knew Beavers paid for the room and retained a key, "Lee's expectation of privacy in the room was relatively diminished." Appellee's Br. at 21. However, as noted above, both parties regarded the suite as Lee's and the government does not seriously argue to the contrary. Everyone involved apparently knew that Lee was to remain in the suite overnight, and there is nothing to suggest that anyone ever expected

Beavers to remain in the suite for any length of time. "From the overnight guest's perspective," the expectation of privacy in a hotel room is entitled to the same respect as afforded one's actual home under the Fourth Amendment. *Minnesota v. Olson,* 495 U.S. 91, 99 (1990). Thus, "[n]o less than a tenant of a house, or an occupant of a room in a boarding house, ... a guest in a hotel room is entitled to constitutional protection against unreasonable searches and seizures." *Stoner v. California,* 376 U.S. 483, 490 (1964).

Accordingly, the fact that Beavers rented the suite for Lee and retained a key to Lee's suite before surrendering possession to Lee for the latter's sole occupancy is little more than a technicality of convenience that the government devised to fortify this intrusion against the expected suppression motion. It is entitled to no more consideration than that.

> [I]t is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical. (W)e ought not to bow to them in the fair administration of the criminal law.

Id. at 488. To the extent the Fourth Amendment has any vitality in an era of increasingly sophisticated electronic eavesdropping, it surely protects the privacy of someone in

the intimacy of a hotel suite from the potential of warrantless 24-hour video surveillance.

As noted above, the majority concludes that the Supreme Court's analysis in *Hoffa* negates Lee's claim of privacy. Lee, like Hoffa, "was not relying on the security of his hotel suite when he made incriminating statements to [Beavers] or in [Beavers'] presence." *Hoffa*, 385 U.S. at 302. Beavers, like the confederate in *Hoffa*, "was in the suite by invitation, and every conversation which he heard was either directed to him or knowingly carried on in his presence." *Id.*

It is now clear that the Fourth Amendment does not protect "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." *Id.* However, this means that Lee's expectation of privacy is only unreasonable insofar as he actually made statements in Beavers' presence, or allowed Beavers to see the effects inside his suite. It does not mean that Lee's expectation of privacy in things beyond Beavers' earshot or line of sight was unreasonable. Indeed, that expectation remained reasonable and should be protected under the Fourth Amendment.

However, the concealed camera was capable of sweeping the hotel suite at a 360-degree angle, thereby displaying for the FBI all of Lee's effects inside the suite whether or not Beavers would have been able to see them. Neither *Hoffa* nor any other legal precedent supports such an abrogation of the fundamental right of privacy.

B. Lee's Right of Privacy

The Fourth Amendment states that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." U.S. CONST. Amend. IV. At the very core of the Fourth Amendment "stands the right of a [person] to retreat into [his or her] own home and there be free from unreasonable governmental intrusion." *Silverman v. United States*, 365 U.S. 505, 511 (1961).

It has often been said that "the Fourth Amendment protects people, not places." *Katz*, 389 U.S. at 351. However, my colleagues appear to assume that since Lee admitted Beavers to his suite (the place), Lee (the person) lost all constitutional protection. That conclusion would be warranted if Lee had allowed Beavers' unlimited access to everything that was within the 360-degree field of vision of the video camera. However, despite its assertion to the contrary, the government has not established that he did. "[T]he capacity to claim the protection of the Fourth Amendment depends . . . upon whether [Lee] has a legitimate expectation of privacy" in those portions of his hotel room that were beyond the gaze of Beavers. *Minnesota v. Olson*, 495 U.S. 91, 95(1990) (ellipsis in original; internal citation and quotation marks omitted).

Unlike my colleagues, I conclude that Lee's expectation of privacy in anything inside the suite that he did not knowingly let Beavers see was reasonable, and entitled to Fourth Amendment protection.

Moreover, the government was able to peer into Lee's hotel room even after Beavers left. "When [the informant] leaves [the] premises, [the subject] is left with the expectation of privacy in his surroundings which is not only actual but justifiable. . . ." *United States v. Padilla,* 520 F.2d 526, 527 (1st Cir.1975) (citing *Katz,* 389 U.S. 347).

C. Video Surveillance Under *Hoffa*

In *United States v. Felton,* 753 F.2d 256 (3d Cir.1985), we explained the invited informant rule in the context of a monitored telephone conversation. There, we stated:

> Insofar as the Fourth Amendment is concerned, one party to a telephone conversation assumes the risks that the other party (a) will permit a third party to eavesdrop on an extension telephone, for the purpose of communicating what he heard to the police, or (b) may be a police informer who will relate or record or transmit a conversation to the authorities, or (c) may record the conversation and deliberately turn it over.

Id. at 260. We then stated: "the expectation of privacy is not measured by what takes place during or after the conversation, it is measured by what is expected before the conversation begins." *Id.* As then-Chief Judge Aldisert so plainly explained, "[w]hen you pick up that phone and talk, you can't trust nobody, nohow, nowhere!" *Id.*

Hoffa's reliance on the Court's earlier decision in *Lopez v. United States,* 373 U.S. 427 (1963) clearly demonstrates

this. *Lopez* is even more relevant to Lee's claim here because in *Lopez*, unlike in *Katz*, the government concealed a transmitter and recorder on a government agent. That agent then interviewed the defendant in the latter's office after being invited in. The defendant was convicted of offering the agent a bribe based on the ensuing conversation, and thereafter argued that the trial court had erred in refusing to suppress recordings of conversations with the agent. The *Lopez* Court began by noting that "it [was] plain that [the agent] could properly testify about his conversation with Lopez;" thus, "the constitutional claim relating to the recording of that conversation emerge[d] in proper perspective." 373 U.S. at 438. The Court concluded that the recordings were properly admitted at trial because "[t]he Government did not use an electronic device to listen in on conversations it could not otherwise have heard." Rather, "the device was used only to obtain the most reliable evidence possible of a conversation in which the Government's own agent was a participant and which that agent was fully entitled to disclose." *Id.*[13] However, neither *Lopez* nor *Hoffa* allow the government to go farther and substitute its own electronically enhanced senses for the mortal senses of the informant. Putting aside for a moment the ability to monitor Lee's suite when Beavers left, absent a showing that Beavers and Agent Reilly were limited to identical observations while Beavers was in Lee's suite, the government's surveillance simply goes too far. The problem

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13. The Court likened Lopez' position to an argument that he had "a constitutional right to rely on possible flaws in the agent's memory, or to challenge the agent's credibility without being beset by corroborating evidence that is not susceptible to impeachment." *Lopez*, 373 U.S. at 439. That position was, of course, untenable.

is only exacerbated by the fact that Agent Reilly had the capability of monitoring Lee at all hours of the day and night even though Beavers was not in the suite. As noted above, it is clear under *Katz* that the fact that Agent Reilly did not peek is not relevant to this invasion of Lee's privacy under the Fourth Amendment.

My colleagues note that they "are satisfied that the tapes [here] do not depict anything material that Beavers himself was not in a position to hear or see while in the room." Maj. Op. at 207. Again, putting aside the intrusion that occurred when Beavers was not even in the suite, I must still respectfully disagree with the majority's analysis. The government concedes that the camera continued to transmit video surveillance of Lee's room on occasion when Beavers left Lee's presence to go to the bathroom, and there is no showing that, in Beavers' absence, Agent Reilly could only see objects that Beavers had already seen, or would see when he returned to the sitting area where Lee remained. Similarly, there has been absolutely no finding here that Agent Reilly was only able to see what Lee knowingly allowed Beavers to see while Beavers was in Lee's presence. Despite its claim that Reilly only saw what Beavers saw, the government concedes that any such limitation on its surveillance would be extremely impractical if not impossible.

D. Audio Surveillance Is Distinguishable From Video Surveillance

My colleagues concede that video surveillance "may involve a greater intrusion on privacy than audio

surveillance." *Id.* at 10-11. Indeed, they could hardly do otherwise. As the Court of Appeals for the Ninth Circuit has observed, in the case of video surveillance:

> [t]he governmental intrusion [is] severe. Hidden video surveillance is one of the most intrusive investigative mechanisms available to law enforcement. . . . [W]e [have] pointed out . . . [that] the defendant ha[s] a reasonable expectation to be free from hidden video surveillance because the video search was directed straight at him, rather than being a search of property he did not own or control . . . . [and] the silent, unblinking lens of the camera was intrusive in a way that no temporary search of the office could have been.

United States v. Nerber, 222 F.3d 597, 603 (9th Cir.2000). The court in *Nerber quoted* Judge Kozinski's concurring opinion in *United States v. Koyomejian,* 970 F.2d 536, 551 (9th Cir.1992). There, Judge Kozinski stated: "every court considering the issue has noted [that] video surveillance can result in extraordinarily serious intrusions into personal privacy. . . ."

This distinction between video and audio surveillance is dismissed by my colleagues. They conclude that "[t]he difference is not nearly as great as the difference between testimony about a conversation and audio recordings of conversation." Maj. Op. at 205. My colleagues then correctly note that "the Supreme Court has not drawn any distinction between those two types of evidence," and they therefore find "no constitutionally relevant distinction

between audio and video surveillance in the present context." *Id.* I must again respectfully disagree.[14]

The government correctly states that it would be extremely impractical to create a situation where the camera's view would be limited to the view of an informant. We all know that we can not see around corners although we can hear around corners. Everyday experience teaches enough physics to know that observers with different lines of sight will have different fields of vision and therefore see different things or the same thing from different angles. One need not study Gestalt theory to appreciate that two observers who see the same object from different angles may "see" two entirely different objects. The observer at point A in a given space may not see the same thing as an observer at point B in the same space. Moreover, no two observers can possibly occupy the exact same space at the same time, and the extent to which their observations may differ increases with the distance between the two observers as well as the increase in the angle formed by their location and the location of the objects they are observing.

The amount of discrepancy in their observations may also depend on the presence of objects in the space between them and the object they are viewing. There is nothing on this record to support a conclusion that Agent Reilly could

14. The majority does not state whether the Supreme Court has been called upon to decide if there is a distinction between video and audio surveillance under the Fourth Amendment. My research did not reveal any such case. Therefore, the Supreme Court's failure to draw a distinction is irrelevant. The Court has never been presented with the question.

only see what Beavers could see at any given instance and I think it fair to say that proposition is a virtual impossibility given the configuration of the usual hotel suite, the number of objects inside it, and the fact that Beavers and the video camera could not possibly have been looking at any given object from exactly the same place.

However, Agent Reilly may well have been only able to hear the same sounds that Beavers heard depending on such factors as the sensitivity of the microphone, transmitting and receiving equipment, as well as the presence of any electronic interference in Lee's room or Reilly's.[15] Nevertheless, since no court has yet addressed the impact of such variables as the sensitivity of the equipment on an invited informant analysis under *Hoffa*, I will assume *arguendo* that Agent Reilly could only *hear* what Beavers heard. However, as I have explained, the same can not be said of the video transmission. This distinction between audio transmissions and video transmissions is crucial to any analysis under *Hoffa* and its progeny if the Fourth Amendment is to withstand the increasing sophistication of electronic surveillance equipment.

The government argues that unless we ignore this technicality "video surveillance would be limited to circumstances where an informant is wearing eyeglasses containing mini-video recorders[,]" and the government emphasizes that "[s]uch a requirement is impractical." Appellee's Br. at 28. However, we can not condone a

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15. *See* The Physics of Sound, http:// interface. cipic.ucdavis. edu/CIL_tutorial/ 3D_phys/3D_phys.htm (viewed on Jan. 22, 2004).

constitutional violation merely because complying with the Constitution would be "impractical." Nor is the government's sarcastic observation that it "is unaware of the existence of such James Bond-like gadgets[,]" *id.*, a satisfactory reply. If the government wishes to engage in this kind of invasive surveillance it need only visit a neutral magistrate; it need not impose upon "Q."[16]

Things that Lee did not knowingly disclose to Beavers remain within Lee's expectation of privacy so long as that expectation is reasonable, and society is willing to accept the expectation as such. "The test of legitimacy is not whether the individual chooses to conceal assertedly 'private' activity, but whether the government's intrusion infringes upon the personal and societal values protected by the Amendment." *Oliver v. United States*, 466 U.S. 170, 182-83 (1984).[17]

The government maintains that "no part of the meeting rooms was obstructed from Beavers' line of sight, and thus, Beavers could see whatever the camera could capture (albeit at a different angle)." Appellee's Br. at 20. As noted above,

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16. Those familiar with the *James Bond* series will recognize "Q" as the bureau chief charged with outfitting Bond with all kinds of unimaginable gadgets.

17. "Since *Katz v. United States*, 389 U.S. 347 (1967), the touchstone of [Fourth] Amendment analysis has been the question whether a person has a constitutionally protected reasonable expectation of privacy. The Amendment does not protect the merely subjective expectation of privacy, but only those expectations that society is prepared to recognize as reasonable." *Oliver v. United States*, 466 U.S. 170, 177 (1984) (internal citations, quotation marks and parentheses omitted).

the majority accepts this premise, stating that it is "satisfied that the tapes do not depict anything *material* that Beavers himself was not in a position to hear or see while in the room. . . ." Maj. Op. at 207 (emphasis added). However, that is supported only by the government's unsupported assertion. The district court never found that the camera's transmissions were no greater than Beavers' observations. In fact, the district court found this was specifically not the case; it noted that "[t]here were instances . . . where perfection was not achieved" such as when Agent Reilly monitored the sitting room while Beavers visited the bathroom. A497. The district court dismissed this "imperfection" stating: "[t]he brief exceptions do not warrant suppression of any or all of the evidence taken on that ground," and the court noted the government's offer to edit out the images recorded while Beavers was in the bathroom. A498. However, the right of privacy can not be quantified in this manner.

As the Court explained in *Kyllo v. United States*, 533 U.S. 27, 37 (2001), "[i]n the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes." Thus, everything and anything inside Lee's hotel suite was an intimate detail meriting Fourth Amendment protection to the extent that Lee did not knowingly allow Beavers to see it. All such details "were intimate details because they were details of the home. . . ." *Id.* at 38, 121 S.Ct. 2038. "It matters not that the search uncovered nothing of any great personal value to [Lee] . . . A search is a search, even if it happens to discloses nothing [of value]." *Arizona v. Hicks*, 480 U.S. 321, 325 (1987).

The district court's minimization of the "imperfection" that occurred, and the majority's failure to insure that Agent Reilly could see nothing more than Beavers could see, undermines their entire analysis of Lee's Fourth Amendment claim. The problem is that Lee's reasonable expectation of privacy was violated, not that the violation may not have revealed anything that was "material" or of evidentiary significance. "The Fourth Amendment's protection of the home has never been tied to measurement of the quality or quantity of information obtained." *Kyllo*, 533 U.S. at 38, 121 S.Ct. 2038. Thus, "any physical invasion of the structure of the home, 'by even a fraction of an inch,' [is] too much." *Id.* at 37 (quoting *U.S. v. Silverman*, 365 U.S. at 512).[18]

Lee's motion to suppress the video tapes should have been granted not because of the materiality of evidence that the governmental intrusion disclosed, but simply because the government's actions violated Lee's reasonable expectation of privacy in his hotel suite.

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18. The Court also noted in *Kyllo* that "*any* information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area' . . . constitutes a search." 533 U.S. at 34. Thus, a search of Lee's suite occurred to the extent that Agent Reilly was able to see anything that Beavers was unable to see, notwithstanding the application of the invited informant doctrine. Obviously, an even greater intrusion occurred once Beavers left and the government's camera remained behind. *See Katz*, 389 U.S. at 356 (as noted above, the "restraint was imposed by the agents themselves, not by a judicial officer.").

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E. *Bond v. United States*

Although the case arises in a very different context, *Bond v. United States*, 529 U.S. 334 (2000), demonstrates the extent to which society recognizes the reasonableness of a residuum of privacy even when some privacy has been surrendered. The defendant there sought to suppress evidence obtained when his carry-on luggage was searched by Border Patrol Agents who had boarded a bus in Texas to check on the immigration status of passengers. As an agent walked through the bus he squeezed the soft luggage which passengers had placed in an overhead storage space. Upon squeezing the defendant's bag the agent felt a "brick-like" object, which the agent assumed to be drugs. That search resulted in a warrantless seizure of drugs inside the defendant's bag. The defendant moved to suppress the evidence. The government argued that the defendant could not have a reasonable expectation of privacy in luggage in an overhead compartment on a bus because "matters open to public observation are not protected by the Fourth Amendment." 529 U.S. at 337. The Court concluded that, although bus passengers expect that their bags may be handled, they do not expect that "other passengers or bus employees will, as a matter of course, feel the bag in an exploratory manner." *Id.* at 338-39. Accordingly, although the actual observation of the defendant's bag in the overhead luggage compartment was not protected by the Fourth Amendment, contents which could only be revealed by manipulation of the bag were subject to a reasonable expectation of privacy. This was true even though police only manipulated the outside of the bag while it remained in place in the luggage rack. Although Bond's carry-on luggage

"was not part of his person," the Court was concerned that carry-on luggage is generally used to transport "personal items that, for whatever reason, [individuals] prefer to keep close at hand." *Id.* at 338. Accordingly, the Court recognized the defendant's expectation of privacy in the contents of the bag was reasonable.[19]

In referring to electronic interception of telephone conversations, the Seventh Circuit has explained, "[e]lectronic interception, being by nature a continuing rather than one shot invasion, is even less discriminating than a physical search, because it picks up private conversations . . . over a long period of time." *United States v. Torres*, 751 F.2d 875, 884 (7th Cir.1984). This situation is exponentially exacerbated where, as here, the government's ability to see intimate details of a defendant's daily activities as he/she goes about his/her business in the presumed intimacy of a hotel suite depends solely on the discretion of the unsupervised agent controlling the monitoring equipment.

> [A]lthough we may spend all day in public places, when we cannot sleep in our own home we seek out another private place to sleep, whether it be a hotel room, or the home of a friend. Society expects at least as much privacy in these places as in a telephone booth—a temporarily private

19. Although *Bond* involves the "plain view" doctrine, not the "invited informant" doctrine of *Hoffa*, it is nevertheless instructive as it clearly supports the conclusion that Lee's expectation of privacy in the contents of his hotel room was reasonable to the extent that he did not allow Beavers to see his effects.

> place whose momentary occupants' expectations of freedom from intrusion are recognized as reasonable. . .

Minnesota v. Olson, 495 U.S. 91, 99 (1990) (internal citation and quotation marks omitted).

Absent a pronouncement from the Supreme Court, or controlling precedent from this court, I simply can not accept the idea that a society that defines privacy as a fundamental freedom can tolerate the warrantless intrusion that occurred here.[20]

F. *Myers, Yonn* and *Padilla*

In affirming the district court, the majority adopts the analysis in *United States v. Myers,* 692 F.2d 823 (2d Cir.1982) and *United States v. Yonn,* 702 F.2d 1341 (11th Cir.1983) and rejects the analysis of the Court of Appeals for the

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20. I can not help but wonder if my colleagues would be as complacent about this situation if presented with a male agent capable of remotely viewing a female suspect in her hotel suite at any hour of the day or night with only self-imposed limitations shielding the female suspect from the wandering eye of the male agent. Clearly, given the analysis of my colleagues that situation would not violate the female suspect's privacy as long as, at some point in the day, she allowed an informant to enter the sitting area of her hotel suite.

I admit that realistic considerations of taste as well as concerns over a jury's reaction to such an intrusion may preclude that situation from ever occurring. But *Katz* seeks to insure that privacy protections be rooted in stronger stuff than the judgment of a given agent or concerns about trial tactics.

First Circuit in *United States v. Padilla,* 520 F.2d 526 (1st Cir.1975). However, *Yonn* does not involve video surveillance and is therefore of extremely limited value to the discussion here for all the reasons I have explained. *Myers* is also of very limited application because the conversations there were not recorded in Myers' hotel room, nor was he an overnight guest in the room where the conversations were recorded.

Myers went to a townhouse to meet with individuals who turned out to be government agents. The court's analysis of Myers' privacy interest consumes only a single sentence in the lengthy opinion. The court states: "[the defendant]'s conversations with undercover agents in whom he chose to confide were not privileged, and mechanical recordings of the sights and sounds to which the agents could have testified were proper evidence." 692 F.2d at 859. The court then cites to *United States v. White,* 401 U.S. 745 (1971).

White involved a defendant who was convicted based upon evidence police obtained by using a "radio transmitter" to transmit and secretly record incriminating conversations between the defendant and the government informant. Inasmuch as *White* involved audio transmissions rather than video transmissions, and the *Myers* Court failed to discuss why the video transmissions had no more impact on a subject's privacy than the audio transmissions in *White,* I am remain unpersuaded.

On the other hand, *Padilla* involved video surveillance inside a residence and is much closer to the situation here, but the court's analysis reads as though partly influenced by a concern for the potential abuses of emerging surveillance

technology. My colleagues criticize those concerns *222 noting: "Although *Padilla* was decided more than a quarter century ago and has not been followed in any other circuit, we are not aware of evidence that the installation of recording devices to monitor meetings attended by a cooperating individual has led to the sort of abuse that the *Padilla* Court feared." Maj. Op. at 206. There are several reasons why that criticism is less than convincing.

Initially, I note that the issue of whether this technology has been abused was never raised here and there is absolutely no record one way or the other as to the extent of government any abuses of sophisticated surveillance technology. In addition, very few cases have addressed the problem of video surveillance involving an invited informant. In one that has, a miniature camera was carried in the informant's jacket and transmitted video images to a nearby agent. *See United States v. Davis,* 326 F.3d 361, 363 (2d Cir.2003).[21] The court rejected the defendant's Fourth Amendment argument stating: "[b]ecause the hidden camera did not capture any areas in which Davis retained a privacy interest, no Fourth Amendment violation occurred." 326 F.3d at 366. As I note above, no such showing has been made here, and the district court found to the contrary on at least two occasions when Beavers was in the suite. Yet the court in *Davis* was careful to limit is holding to only those things that the informer could see while in the defendant's presence. The court specifically

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21. Since the camera was in the informant's jacket, there is a stronger basis to assume that the informant's field of vision closely approximated that of the monitoring agent than exists on this record.

stated: "We . . . extend the rule of *White* and *Lopez* to video recordings that capture images visible to the consensual visitor. . . ." *Id.* at 363.

G. Dangers Inherent in Warrantless Video Surveillance

Although sensory enhancement has not displaced the guarantees of the Fourth Amendment, "[i]t would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology." *Kyllo,* 533 U.S. 27, 33-34 (2001). However, given the evolving sophistication of technology, it is increasingly imperative that the fundamental liberties guaranteed under the Fourth Amendment not be eroded by the warrantless use of devices that allow the government to see through curtains, walls and doors.

In *Kyllo,* the Court addressed the tension between law enforcement's innovative use of technology, and the right to privacy. The Court stated:

> While it may be difficult to refine *Katz* when the search of areas such as telephone booths automobiles, or even the curtilage and uncovered portions of residences is at issue, in the case of the search of the interior of homes . . . there is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that *exists* and that is acknowledged to be *reasonable.* To withdraw protection of this minimum expectation would be to permit police technology

> to erode the privacy guaranteed by the Fourth Amendment.

533 U.S. at 34 (emphasis in original).[22]

The Court was careful to reaffirm *Katz* in the face of challenges presented by increasingly sophisticated technology. In doing so, the Court expressed concerns very similar to the concerns in *Padilla* that my colleagues dismiss. Writing for the Court, Justice Scalia states: "[r]eversing [the approach outlined in *Katz*] would leave the homeowner at the mercy of advancing technology . . . that could discern all human activity in the home." 533 U.S. at 35-36. The Court also mentioned that "[t]he ability to 'see' through walls and other opaque barriers is a clear, and scientifically feasible, goal of law enforcement research and development." *Id.* at 36 n. 3 (citing The National Law Enforcement and Corrections Technology Center website, www.nlectc.org/techproj/, as visited on May 3, 2001).

In *Silverman,* the Court also mentions electronic devices that, according to the defendant there, warranted revisiting prior cases including *Katz.* The Court explains its refusal to do so as follows:

> We are told that re-examination of the rationale of those cases . . . is now essential in the light of

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22. Although the Court there focused on "the interior of homes," I have already explained that no distinction can be drawn for our purposes between homes, and the interior of Lee's hotel suite, *Olson,* 495 U.S. at 99, and the majority does not suggest the contrary.

> recent and projected developments in the science of electronics. We are favored (sic) with a description of a device known as the parabolic microphone which can pick up a conversation three hundred yards away. We are told of a still experimental technique whereby a room is flooded with a certain type of sonic wave, which, when perfected, will make it possible to overhear everything said in a room without ever entering it or even going near it. We are informed of an instrument which can pick up a conversation through an open office window on the opposite side of a busy street.

Silverman, 365 U.S. at 508 (internal quotation marks and citation omitted).[23]

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23. In *Silverman*, the owner of a vacant house had granted police permission to use that property to conduct a surveillance of an attached property where police suspected gambling operations were being conducted. They conducted the surveillance by means of a long "spike microphone" which they passed through the properties' joint wall until it made contact with a heating duct in the target property. That "duct became in effect a giant microphone, running though the entire house occupied by appellants." 365 U.S at 506-07 (internal citation omitted).

The case is distinguishable from the situation here not only because it involves only audio monitoring, but also because the Court's ruling was based on the fact that the defendant did not consent to the intrusion that resulted from the spike mike contacting the heating duct in his property. "[T]he officers overheard the petitioners' conversations only by usurping part of the petitioners' house or

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At the risk of appearing alarmist, I think it important to note that, in rejecting defendant's invitation to reexamine Court precedent because of the evolving technology, the Court explained: "We need not here contemplate the Fourth Amendment implications of these and other frightening paraphernalia which the vaunted marvels of an electronic age may visit upon human society." 365 U.S. at 509.

The majority lists three reasons for rejecting the concerns reflected in *Padilla* and doubting that "law enforcement [is] likely to find" abuse of technology "an alluring strategy." Maj. Op. at 206. My colleagues rely upon the possibility of a civil penalty under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), the need to acquire a warrant or permission of a cooperating individual to enter the premises to install a monitoring device, and skepticism that law enforcement has anything to gain because "[a] video tape . . . generally reveals whether a cooperating individual is present, and without proof of the presence of the cooperating individual, the tape is inadmissible." Maj. Op. at 207.

I must respectfully characterize the majority's trivialization of the potential for abuse as naive. Operation of the technology mentioned in *Silverman* and *Kyllo* requires neither entry nor permission to enter an area of expected

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office—a heating system which was an integral part of the premises occupied by the petitioners, a usurpation that was effected without their knowledge and without their consent." *Id.* at 511. Here, Beavers' consent to the placing of the camera limits *Silverman's* applicability. However, as explained above, there remains an issue of Lee's reasonable expectation of privacy under *Hoffa* and its progeny.

privacy. In *Kyllo*, Justice Scalia mentions several technological innovations that require neither physical entry nor consent. These "include a 'Radar-Based Through-the-Wall Surveillance System,' 'Handheld Ultrasound Through the Wall Surveillance,' and a 'Radar Flashlight' that 'will enable law enforcement officers to detect individuals through interior building walls.'" 533 U.S. at 36 n. 3.

In addition, though my colleagues contend that, absent consent, the warrant requirement can be relied upon to prevent abuse of such technology, the facts before us should readily dispose of that notion. It is clear that none of the agents involved in monitoring Lee's hotel suite decided to err on the side of caution and obtain a warrant prior to installing a video camera that could transmit video of his living area, as well as parts of the bedroom and bathroom throughout the day and night. In fact, the record shows that the possibility of a warrant was never even discussed with Agent Reilly. Moreover, Lee clearly did not consent to the FBI installing a camera that could potentially broadcast some images of his bedroom and bathroom activities throughout the day and night. As explained above, we can not rely upon technicalities of consent as found in property law to stretch Beavers' consent that far. *See Stoner v. California*, 376 U.S. 483, 489 (1964). Thus, I do not think the legal analysis in *Padilla* can be dismissed because the opinion might be construed as "alarmist." Rather, the court there expressed the very concerns the Fourth Amendment was intended to protect; concerns that the Supreme Court also expressed in *Silverman* and *Kyllo*.

The majority does concede that it is not willing to go "so far as to say that there is no risk of the type of abuse that worried the *Padilla* Court," but concludes that "the risk is not great enough to justify the holding of the *Padilla* Court." Maj. Op. at 207. However, the holding in *Padilla* rests not upon the risks the court properly identified, but on a proper reading of Supreme Court precedent. The court explained: "We do not read either *White* or its predecessors, *Katz v. United States*, and *Hoffa v. United States*, to go farther than to say that a person has no justifiable expectation that one with whom he converses will not tell the authorities of the conversation, and that accurate recordings of the conversation are therefore permissible." 520 F.2d 526, 527 (citations omitted). *See also United States v. Shabazz*, 883 F.Supp. 422 (D.Minn.1995) (relying upon *Padilla* to suppress audio and video recordings of conversations in the defendant's hotel room).

My colleagues' remaining justifications for dismissing the concerns expressed in *Padilla* are equally unpersuasive. The "remedy" of a *Bivens* action is often no remedy at all. The Fourth Amendment is intended to afford a right of privacy, not to compensate individuals whose privacy has been violated. Moreover, limitations that arise under the doctrine of qualified immunity may make it exceedingly difficult to establish the predicate showing of unreasonableness required to sustain an action under *Bivens*. where the alleged transgression involves the innovative application of new technology. *See Saucier v. Katz*, 533 U.S. 194 (2001). [24]

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24. Under *Saucier*, a *Bivens* plaintiff must first establish that legal requirements in a given situation would have been clear to a

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Lastly, my colleagues doubt that "law enforcement would have much to gain from monitoring conversations that occur when a cooperating individual is not present." A video tape of a conversation generally reveals whether a cooperating individual is present, and "without proof of the presence of the cooperating individual, the tape is inadmissible." Maj. Op. at 207. However, that misses the point on several fronts as I have already explained. The informant's presence does not guarantee that he/she sees the same thing that the government transmits and records and it is therefore not tantamount to consent. More importantly, however, as the Court clearly noted in *Kyllo,* it is the *intrusion,* not the evidence that is the problem. The suppression of the evidence is only important because of its impact on police behavior.[25]

III. Conclusion

The Constitution's primary bulwark against arbitrary intrusions into our privacy is the warrant requirement of the Fourth Amendment. "The [Fourth Amendment] reflects the recognition of the Framers that certain enclaves should be free from arbitrary government interference." *Oliver v. United States,* 466 U.S. 170, 178 (1984).

> The presence of a search warrant serves a high function. Absent some grave emergency, the

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reasonable officer. *Bennett v. Murphy,* 274 F.3d 133, 136-37 (3d Cir.2002). The speed of technology's advance will often make that an insurmountable hurdle to a *Bivens* plaintiff challenging the government's warrantless use of a new technology.

25. For a general discussion of the purposes of the exclusionary rule, see *Terry v. Ohio,* 392 U.S. 1, 13 (1968).

> Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals.

McDonald v. United States, 335 U.S. 451, 455-56 (1948).

I believe the government's end run around that "high function" here requires that we reverse the district court's ruling on Lee's Fourth Amendment claim. I have already explained that, although Agent Reilly's restraint may be commendable and demonstrate the government's good faith, that is not sufficient given these facts. Rather, as I explained above, a warrant is required to insure that such invasions are warranted and conducted in an appropriate manner. The invited informant doctrine only increases the need to obtain a warrant in advance of this type of video surveillance. "No police officer would be able to know *in advance* whether his through-the-wall surveillance picks up intimate details—and thus would be unable to know in advance whether it is constitutional." *Kyllo*, 533 U.S. at 39 (internal quotation marks omitted). "[A] search which is reasonable at its inception may violate the Fourth Amendment by virtue of its [subsequent] intolerable intensity and scope." *Terry*, 392 U.S. at 17.

Katz was not the first time that the Court has declared that liberties protected by a warrant requirement can not be left to the discretion of law enforcement officers absent exigent circumstances not involved here. More than half a century ago, the Supreme Court declared:

> The point of the Fourth Amendment, which is often not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Johnson v. United States, 333 U.S. 10, 13-14 (1948). That is why the warrant requirement applies in situations such as the one before us here.[26]

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26. In arguing that the government was obligated to obtain a warrant for this kind of electronic surveillance, I realize that the authority of the federal courts to issue search warrants authorizing video surveillance is uncertain under Title III of the Omnibus Crime Control and Safe Streets Act of 1968. *See* 18 U.S.C. § 2511 (a section of Title III).

We have never determined whether Title III authorizes federal courts to issue warrants for video surveillance, and there is considerable authority that it doesn't. *See United States v. Falls*, 34 F.3d 674, 679 (8th Cir.1994); *United States v. Koyomejian*, 970 F.2d 536, 539 (9th Cir.1992); *United States v. Torres*, 751 F.2d 875, 880 (7th Cir.1984). However, although these courts have concluded that

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I can not endorse my colleague's willingness to entrust the fundamental right of privacy to law enforcement's discretion. Accordingly, I must respectfully dissent from my colleagues' analysis of Lee's Fourth Amendment claim.

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Title III does not give federal courts that authority, courts have consistently found that authority under Fed.R.Crim.P. 41(b), as well as under the inherent supervisory powers of federal courts, so long as any warrant that may issue contains the safeguards of the restrictions embodied in Title III. *See, e.g., In the Matter of the Application of the United States of America for an Order Directing X to Provide Access to Videotapes,* 03-MC-89, 2003 U.S. Dist. LEXIS 15227 at *4, *5 n. 1, *9 n. 3 (D.Md. Aug. 22, 2003); *see also Falls,* 34 F.3d at 678-79; *Koyomejian,* 970 F.2d at 542; *Torres,* 751 F.2d at 877-78.

APPENDIX B — EXCERPTED TRANSCRIPT OF DECISION OF JUDGE JOHN W. BISSELL OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED APRIL 10, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CRIMINAL NO: 99-640

UNITED STATES OF AMERICA,

vs.

ROBERT W. LEE, SR. and ROBERT LEE, JR.,

Defendants.

PRELIMINARY HEARING

Newark, New Jersey

Monday, April 10, 2000

BEFORE: HONORABLE JOHN W. BISSELL, U.S.D.J.

* * *

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[commencing at p. 82]

THE COURT: Specifically addresses video in this context.

MS. FERGUSON: Yonn is a video and Cox, which I cite in my brief, Cox is a video.

THE COURT: All right. Thank you. I don't think Yonn is.

MS. FERGUSON: The latter one certainly is. Laetividal Gonzalez, also a case, L-a-e-t-i-v-i-d-a-1 Gonzalez, 939 F.2d 14 55. I cite it in my brief.

THE COURT: Thank you.

MS. FERGUSON: Myers is a Second Circuit case. I believe that was also --

THE COURT: I understand Myers. Myers was common area. So that's less significant than it otherwise might be.

MS. FERGUSON: But the potential someone's going to adhere, that's the defendants are asking you to use your supervisory powers in the Fourth Amendment area. Not that there was an actual violation here but the government could have violated their rights.

As the Supreme Court said in Painer (phonetic), that's not appropriate.

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THE COURT: Anything further?

MS. FERGUSON: No.

THE COURT: Thank you.

I'll take the bench 12 noon, I'll have the decision for [83] you.

Thank you.

(After a recess court resumed.)

[84] THE COURT: When the motion to suppress from use as evidence in this case certain video recordings and their audio portions as well, taken at the Holiday Inn in Virginia in June and December of 1997 and October of 1998, first surfaced, we were up against what appeared to be the imminent commencement of the trial. On a quick look at the issues raised in the papers and initial arguments, this Court professed its inclination to view the motion favorably with regard to the recordings taken on the two occasions in 1997 based upon the fact that they were taken in a suite of contiguous rooms made available to Mr. Zee, Senior, for his overnight stay in Virginia; whereas the tape recording from October of 1998 had been taken in a separate room more akin to a conference room rather than an integral part of his residential quarters.

The Court adheres to its original inclination based upon this record with regard to the October 1998 tape recording. Stated briefly, that was a separate room with only an entrance

from the exterior corridor. It was not employed by Mr. Lee for his overnight stay in terms of sleeping quarters. While adjacent to his bedroom, it was not adjoining in any sense. There was no door that connected to it. Certainly, no doors remained open during the events in question. And, thus, I feel this case is comparable to *Myers* and to the facts in *Cox* in which Mr. Lee was, at most, a temporary occupant of that room for the very purpose of the meeting itself.

[85] That being so, the Court determines that he did not have either an actual or reasonable expectation of privacy in that room which would cause this Court to require that the tape and video recordings taken there be suppressed for violation of his Fourth Amendment rights.

As far as the inclinations expressed by the Court with regard to the 1997 interceptions, after a thorough analysis again of not only the record generated here but the applicable case law and the arguments I have heard, I have determined that the tape recorded evidence secured on those occasions also should not be suppressed.

I reserve the powers of this Court, as set forth in our local rules expressly, to amplify and edit the remarks that I am making today. I will try to certainly advise you of reasons and bases for this decision, but I may chose at some point to make a more detailed record of fact-finding.

As we know, there is no prospect of interlocutory appeal at this time. The trial will proceed tomorrow with the arrival of the jury. Therefore, any supplementation of this opinion can take place at a future point if I determine, upon examination of the transcript, that it is advisable to do so.

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Actually, the basic material underlying facts in this case are not particularly complex on each of the occasions in question in June and December 1997, the FBI rented a suite of rooms for Mr. Lee which included a sitting room and kitchenette, [86] from which one could walk through a continuously open door, into a bedroom, which also had a bathroom in it.

The video/audio monitoring device was set up in a concealed location in the room on each occasion the day before the arrival of Mr. Lee. On the day in question, Mr. Lee was intercepted on both audio and video in the course of a number of discussions with Mr. Beavers. These were discussions to which Mr. Beavers had consented and indeed was very well aware from the outset. He himself wore a body wire which malfunctioned and did not itself produce a tape recording of usable quality.

I find that, in fact, reasonable safeguards were undertaken by Ms. Reilly, the operator of the viewing equipment, in yet another adjacent room on the other side of the sitting room, to adhere to the scope of the consent of Mr. Beavers by recording only events in which Mr. Beavers personally participated, hence, event which he himself could have seen and heard, although his line of vision would have been different from the angle of the camera.

There were instances in the course of the monitoring where perfection was not achieved. Instances when Mr. Beavers, as I recall, on both occasions went to the bathroom, which was located in the adjacent bedroom, and while claiming to be in earshot, at least was not in eyesight of the events taking place in the sitting room.

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The Court determines this, however, was certainly not [87] prevalent and doesn't indicate a coming to fruition of the concerns expressed in such cases as *Padilla* and *Shabazz*, which I will address more completely in a few minutes. Rather, the minimization in order to ensure the limited use of the audio/visual equipment to the contents of either direct conversations with Mr. Beavers or events that could be viewed at the time when he also was present, was sufficiently effective. The brief exceptions do not warrant suppression of any or all of the evidence taken on that ground.

The government has volunteered to edit from the tape recording any visual images which might have occurred while Mr. Beavers was in the bathroom and, hence, out of sight of Mr. Lee, even though the door was open, according to the record at present. Whether those particular images are particularly incriminating or significant in the presentation as a whole, of course, is not entirely clear but it's also not material to this ruling.

I'd like to take a moment and analyze some of the cases here with which we are now familiar. I'll start with *Padilla*, the oldest and in some respects, mercifully, the briefest of the opinions in question.

The situation there was very similar to that at bar. There, the DEA rented two rooms at the Caribe Hilton Hotel in San Juan, Puerto Rico; set themselves up in one and booked the other for the defendant's use overnight. In that case [88] government agents who were participants in the conversations were, of course, the consenting individuals.

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Chief Judge Coffin wrote for the First Circuit in this opinion. There are probably fewer judges who are more respected, at least in the recent history of our courts, than he. Accordingly, I paid very close attention to his remarks.

However, by reason of its brevity, I don't think that this case follows through sufficiently. Furthermore, each case turns very much on its own facts, particularly with regard to the degree of privacy that might be reasonably anticipated in the location in question.

Judge Coffin stated, and I quote, "We do not read either White or its predecessors . . ." -- Katz and Hoffa -- "to go farther than to say that a person has no justifiable expectation that one with whom he converses will not tell the authorities of the conversation and that accurate recordings of the conversation are therefore permissible. The built-in limitation on the frustration of such a person's actual expectation of privacy is that no more can be recorded than is given to one who is, mistakenly or not, trusted."

I agree with that analysis. And, in fact, in this Court's view, the use of video/audio equipment at a location other than on the physical body of the other party to the conversation is not as significant as *Padilla* and later *Shabazz* emphasized. As Judge Coffin continued, "When one's confidante [89] leaves his premises, he is left with an expectation of privacy in his surroundings which is not only actual but justifiable." Citing *Katz.*

This Court also agrees but in this case there was, in fact, no operation of the equipment after the departure of

Mr. Beavers from the premises. That was also true in *Padilla*, at least as alleged.

Judge Coffin was concerned about a potential for abuse. One must remember, however, that, as far as we can tell, this is the seminal case in this field, now 25 years old. He wrote further, "Electronic devices could be installed for lengthy periods of time without antecedent authority, so long as only a suspect's conversations with police agents were offered in evidence and the enforcement officials alleged that nothing else was recorded. Under this approach a room or an entire hotel could be bugged permanently with impunity and with the hope that some usable conversations with agents would occur."

That, of course, is the 1984 Big Brother concern which was expressed and amplified in the *Shabazz* opinion. But once again, that is not what happened here in fact. And in examining the facts, there was nothing that even approached such an abuse. Not in showing Mr. Sierra a quick test pattern for four or five seconds, hours before the recording began and not in the one or two glitches when Mr. Beavers was out of eyesight in the course of the recorded conversation.

[90] Continuing on behalf of Judge Coffin, and I quote:

"No case has been presented to us which would allow the government to engage in unlawful electronic surveillance and profit from the fruits of that surveillance on the ground that had a different means been employed, the recordings would have been admissible. We reject the invitation so to extend the holding of White."

Of course, what Judge Coffin is referring to there is the use of a fixed location; in that case an audio recording device other than a body wire, which had previously been approved in the *White* case. So Judge Coffin, essentially, on the eve or at the commencement of the exploration of issues of this kind, is rightfully concerned I think on that occasion and at that time about extending Supreme Court precedent as he sees it and potentially opening a door to the indiscriminate use of recording devices in such places as hotels or possibly even homes.

Judge Coffin, in the *Padilla* case -- of course his opinion was unanimous -- specifically said, "We reject the invitation so to extend the holding of White." I believe that's an understandable result but not the last word.

I'm going to move to the *Shabazz* opinion, although it is later in time than *Yonn*, the Circuit opinion on the other side of the fence from *Padilla*, in order to complete the thoughts and the analysis of those jurists who have taken a [91] position which, at least arguably, would have supported that of the defendant in this case.

Shabazz is even closer to the present matter. In that case, "Michael Fitzpatrick, the government informant, using government-supplied funds, rented a hotel room for Ms. Shabazz. The room was to be the defendant's and her young son's temporary residence upon her arrival in Minneapolis, Minnesota, from New York, New York. Mr. Fitzpatrick gave his consent to have the room wired for audio and video recordation. The monitoring devices were in the next room and were controlled by federal investigative agents. No recordings were made by body microphones."

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Similarly in this case, except for the fact that body wires were attempted here and were unsuccessful. The Magistrate Judge in the Shabazz case had issued a report and recommendation that would follow the *Yonn* rule and have upheld the evidence secured by the audio/videotapes. The District Judge, however, disagreed and follows *Padilla.*

In the language of that Court, "While it is the law that the Fourth Amendment protects people, not places . . ." citation omitted -- "it is a fact that people occupy those places. And the most respected of all places is an individual's abode." Citation omitted. "In this case, the government's intrusion into the defendant's rented home is so massive and unregulated as to require the suppression of its product."

[92] After analyzing *Padilla* and declining to follow *Yonn*, the *Shabazz* court made a few additional observations and I quote.

"The emplacement of continuously operable transmission and recording devices is not the same as a conversation with a wired informant. When a conversant knows that the hearer is present, the information is freely given and the speaker bears the risk. On the other hand, if microphones and cameras are hidden in one's home and are operable, even in the absence of the informant, then Big Brother is literally within the walls. Even if the devices are turned off when the informant is absent, the government, at its whim and ungoverned discretion, retains the capacity to invade the occupant's room. The government's option to surveil continues even in the absence of the implicit consent shown when speaking to another person."

This, of course, once again, is an endorsement of the *Padilla* view of the potential fox abuse. And, frankly, had this Court determined that in the operation of the equipment in the case at bar anything approaching that potential had been employed -- and as I say, that was not the case here -- it might well have concluded otherwise.

But I stick to the view which *Yonn* espouses, and which we'll deal with in a few minutes, that we are better off focusing upon the facts of a given case, upon the operation of the equipment in a given case, than in endeavoring to enact some [93] sort of prophylatic rule that would in guarding against potential abuse, unnecessarily limit legitimate surveillance in a given case. Essentially, in this Court's view, it is dangerous to enact such a broad ruling, however well-intentioned it may be, as an endeavor to guard against abuse.

In further language of *Shabazz*, "The Court finds that Padilla is better reasoned. Its reasoning, plus the government's retained capacity to intrude, compels the Court's decision. Here, the government did not seek a warrant. The government declined to outfit its informant with a body microphone. There was no exigent circumstance; the alleged plot had been in the planning for months. The putative victim was at no risk; the presumed executioner was the government's informant."

Those, of course, are factors that may go into warrants or Title III applications. But, once again, Ms. Ferguson emphasized here and specifically set forth the statute itself. If you're dealing in a consensual recording context, those

considerations are less significant; and in this case, virtually insignificant.

The court then went on to hold in *Shabazz*, that under the circumstances involved the defendants not only had an actual but a justifiable expectation of privacy. Some of the factual considerations involved there were important, however. Once again in the language of the *Shabazz* Court, "The defendant [94] arrived in Minnesota with her minor child. Mr. Fitzpatrick lured her as both an alleged conspirator and apparently under the guise of marriage. Her presumed life companion gave her the room in which she would sleep. On these facts, the Court determines that the defendant had an expectation of privacy in her surroundings. Ms. Shabazz's expectation was not only actual, but justifiable."

There are some differences between *Shabazz* and the facts of this case. Mr. Lee was not lured to Virginia under expectations or promises or guises as apparently were present in the *Shabazz* case. I believe this record reflects that he often made trips to Virginia of this sort for conversations with Mr. Beavers or Mr. Brennan about IBF matters. The hotel was secured for him in the normal course of events. Mr. Beavers did retain a key. I think that is at least a matter of some relevance in terms of the fact that Mr. Beavers was in a position to come and go if he chose and, to some extent, reduces the reasonableness of any expectation of privacy, at least in the company of Mr. Beavers. It was Beavers who obtained this room. It was Beavers who was in a position to come and go basically, and Beavers who retained a key to this hotel suite. These facts demonstrate that there were less indicia of the equivalence to a private residence than one

would find the room of Ms. Shabazz to be or even that secured for the defendant in the *Padilla* case. And particularly the sitting room (once again, employed for these [95] conversations and meetings and not his immediate bedroom area) acquires less of the equivalence to a home than would appear to have been present in *Shabazz* and *Padilla*.

These are fine lines to be drawn on the very facts themselves. We are looking at a question of what one might reasonably anticipate. That itself is an inexact science. There are some distinguishing features here which I've endeavored to enunciate.

The *Shabazz* Court in its conclusions on this subject found that this was the type of case that had been forcast by Judge Legg in the *Cox* case, although not one actually present in that matter. The *Shabazz* Court continues:

"The Court finds that this is such a case. Here, Mr. Fitzpatrick had no right to consent to the placement of recording devices in Ms. Shabazz's room. The government had no warrant or judicial supervision. The government was free to surveil at will and was not constricted when the informant was gone, except by the investigator's presumed discretion. The recordings are properly suppressed. The government could have minimized this massive intrusion by obtaining a warrant, or even by being constrained by a minimization instruction or order. The failure to take these steps is fatal under the Fourth Amendment."

Appendix B

I think under close scrutiny that analysis just doesn't hold up. To me, it had a very attractive view when I first read [96] it last week. But upon further reflection, let's look at it closely.

I think it is the law that Mr. Fitzpatrick, and in this case Mr. Beavers, did have the right to consent to the placement of recording devices in Mr. Lee's room because of, at least, a reduced expectation of privacy in that sitting area given all the facts of this case, both those at the time and the operating history between the individuals.

Second, the government had no warrant or judicial supervision, to be sure, but that's in a different context than what we're dealing with here when you have a consentual discussion. "The government was free to surveil at will and was not constricted when the informant was gone, except by the investigator's presumed discretion." In looking at the opinions in *Padilla* and *Shabazz*, I do not feel that that hypothetical potential for abuse is or should be determinative. One should analyze the facts of the case before it.

Moving on. "The government could have minimized this massive intrusion by obtaining a warrant . . ." -- not really because that wasn't a viable alternative then or here in this court's view -- "or even by being constrained by a minimization instruction or order."

That's an interesting observation.

One of the things the *Shabazz* Court wished to address was the fact that there were not any outstanding directives to [97] the operating FBI agent reflecting what his or her

instructions were. That's not a determination which I would make in the present case. Ms. Reilly knew her instructions and complied with them other than, as I said, in a couple of mistaken instances which were not fatal.

The Court endorses the approach taken by the 11th Circuit in the *Yonn* case; once again, a case comparable to the case at bar with the exception of the fact in *Yonn* there was a video recording. However, without belaboring the decision and the conclusions reached therein at great length, *Yonn* presents a situation comparable to ours although involving audio and not video.

The court finds, by the way, no meaningful distinction between the two on the facts of this case. The government has offered to excise if the defense agrees, or maybe even if it doesn't, any portions of the video tape which can be readily identified as being made when Beavers was not in a position to view the sitting room. Under those circumstances, the Court does not perceive a difference between the use of audio and video in this consentual electronic recordation.

The device was placed in a motel room registered to Mr. Yonn and intercepted conversations that he had with a Mr. Dozier. The recorder was activated only when Dozier was in the room. That's our case as well.

The Court's first observation, once again seizing upon [98] this catch phrase from the *Katz* opinion, was that the Fourth Amendment protects people not places. I'm not sure that I would necessarily endorse that remark in all instances, but it did not protect this place, the sitting area of the motel suite secured for Mr. Lee.

Appendix B

Continuing in the *Yonn* matter, "The location of the conversations that were intercepted is not determinative; the proper inquiry is whether the government's activities in electronically listening to and recording the conversations violated privacy upon which [the defendant] justifiably relied.

"Under this inquiry, it is well-established that a constitutionally protected expectation of privacy does not attach to a 'wrongdoer's misplaced belief that a person to whom he voluntarily confides *his* wrongdoing will not reveal it.'"

That of course cites the Hoffa case.

"Thus, the Fourth Amendment did not protect Yonn from the risk that Dozier would disclose the contents of their discussions. Moreover, as the defendant concedes, there could have been no violation of his expectation of privacy if Dozier had made the recording with a device planted on his person rather than one concealed in the room. Nonetheless, the defendant urges the creation of a constitutional distinction which depends on the location of the recording apparatus. The location of the electronic equipment does not alter the irrefutable fact that Yonn had no justifiable expectation of [99] privacy in his conversation with Dozier. For that reason, the warrantless interception and recording of that conversation did not contravene the Fourth Amendment."

The Court believes that analysis is sound. I initially had what might be anybody's inherent concern about the possibility that electronic equipment can be planted in a location which will serve predominantly as a person's

residence, either permanent or temporary. However, a closer scrutiny of the outstanding authority and the pronouncements of jurists more articulate than I, has led me to the conclusion there is not a meaningful distinction of constitutional dimension between a body wire and fixed location video and audio recording equipment where a voluntary conversation takes place.

Now, I don't disagree with Judge Legg's analysis in the *Cox* matter. The *Cox* case is not directly opposite here because like *Myers*, the conversation did not take place in the hotel room of the defendant. *Cox* also involved video and video surveillance, and that matter was upheld upon, among other things, the following findings.

"Christian . . ." -- that's the person who consented to the monitoring of the subject of the inquiry.

"(i) Christian was in the room at all times, so that the police were not in a position to monitor conversations and actions that occurred outside Christian's presence."

That occurred here. With the exception of what I [100] consider to be some de minimis exceptions, this monitoring, in fact, occurred only in the presence of Mr. Beavers.

"(ii) the hotel was small and electronic surveillance did not pick up any words or actions that were outside Christian's hearing and sight."

That also appears to have been the case in this matter. Even when Mr. Beavers went to the bathroom, there is at least some evidence before the Court upon which it could find Mr. Beavers could hear what was transpiring. It was admissible for hearing of this sort.

"(iii) Defendants were under the impression that Christian had rented and paid for the room. They were simply 'guests' there."

That, of course, is not the case here. It was indeed Mr. Lee's hotel suite, but as I've mentioned before, under all the facts of this matter, I don't believe the fact it was his hotel suite gave him any heightened expectation of privacy or any reasonable expectation of privacy in connection with his conversations with Mr. Beavers that were transpiring in this parlor or sitting-room area of this suite.

"(iv)" in part: "The surveillance was not animated by a generalized police interest in spying on citizens to see what might turn up."

That also was exactly the case here. There were specific, specially targeted events, namely, as best I can [101] recall it, discussions between Mr. Lee and Mr. Beavers about the type of activity that eventually worked itself into this indictment, including at least one instance, if not more in this realm, the video viewing of the passage of money. This was not a generalized surveillance. Certainly wasn't long-term and even was not a short-term surveillance to see if something would turn up. So that, at least in terms of *Cox*, three of the four factors are present; the other is not readily distinguishable.

Appendix B

Judge Legg's observations in *Cox*, of course, were endorsed by the *Shabazz* court and they are not to be ignored. I quote:

"The Court recognizes that clandestine video surveillance of a private room is intrusive and that the law generally requires the approval of a neutral judicial officer before the police may wiretap, search or bug a room. The 'consent of one of the parties' exception creates a large exception to this rule. Under different facts, the Court might find the intrusion so great as to be constitutionally impermissible. This case, however, does not present such facts."

I think it could be said that, particularly in light of the fact that this was indeed Mr. Lee's quarters rather than someone else's, that the present case, in that respect at least, approaches the line even more closely than that which Judge Legg was addressing in the *Cox* matter. While it approached that [102] line, it did not cross it and, for reasons which I have stated before, the Court determines that the motion to suppress as to all the videotapes so taken on the two dates in 1997, as well as 1998, is denied.

* * * *

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING DATED MARCH 23, 2004

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

01-1629

UNITED STATES OF AMERICA

v.

ROBERT W. LEE, SR.,

Appellant

SUR PETITION FOR REHEARING

Present: SCIRICA, *Chief Judge*, SLOVITER, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, CHERTOFF, and FISHER, *Circuit Judges*

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied. Judge McKee would have granted rehearing.

Appendix C

By the Court,

/s/ Samuel A. Alito, Jr.
Circuit Judge

DATED: March 23, 2004

APPENDIX D — EXCERPT OF TRANSCRIPT OF DECEMBER 18, 1997 TAPE

NKCM:	32063
DATE:	DECEMBER 18, 1997
TIME:	11:27 AM
TYPE:	CCTV
PARTICIPANTS:	ROBERT W. LEE, SR. DOUGLAS BEAVERS
ABBREVIATIONS:	UNINTELLIGIBLE (UI)

D. BEAVERS: Today's the eighteenth. So it's got to be a week from today. So you got to do that Monday (UI) . . .

(LAUGHTER)

R. LEE, SR.: I got to hurry, hurry.

D. BEAVERS: Hell yeah. Santa Claus fall off his sled.

R. LEE, SR.: Yeah, shit, maybe we be able to do that Monday.

D. BEAVERS: Yeah.

R. LEE, SR.: I hope he can get to town.

D. BEAVERS: Ah huh.

R. LEE, SR.: He, he said maybe ah, you know, since he says he is going to meet with these guys on Sunday, maybe I'll have to comedown there. You know? To Florida.

D. BEAVERS: Down to Florida.

R. LEE, SR.: Yeah.

D. BEAVERS: Get a little sunshine.

R. LEE, SR.: Run down there for a day and come back.

D. BEAVERS: Send Robby.

R. LEE, SR.: Yeah.

D. BEAVERS: He's younger.

R. LEE, SR.: Yeah.

D. BEAVERS: Strong, full of piss and vinegar.

R. LEE, SR.: Yeah (UI). . . . Well listen, I'm going to make one more phone call then you want to grab a little . . .

D. BEAVERS: Yeah.

R. LEE, SR.: Sandwich or something?

D. BEAVERS: We can do that.

Appendix D

R. LEE, SR.: Yeah, let me, let me uh . . .

D. BEAVERS: I'm going to go to the bathroom.

R. LEE, SR.: Yeah.

(TELEPHONE ACTIVITY)

R. LEE, SR.: Hey Luke, this is Bob. Hey Luke, yeah, um, hold, hold on maybe I, I, uh, he didn't leave a number, did he? Yeah, alright, ah, maybe I'll try to call him, he's, he's, he's down in Ventnor so I'll try to reach him. Yeah, yeah alright I'll try to reach him down in Ventnor. Yeah, listen is Robby there? Let me talk to him for a minute. Rob, hey listen, I talked to Cheryl before, you know she, she a little upset she got to go to the doctors on Tuesday, but she eh, she said she didn't have any money, can you run by there and give her something? She wanted it until I get back. Yeah, ah she didn't call you, did she? Alright. But I told her to call you and, uh, get something from you till I got back, you know, so. Yeah, well call her and see when, when she wants you to bring it by there, you know, when you want, okay? Alright, I'll talk to you later. Bye.

(TELEPHONE ACTIVITY)

(COUGHING)

(HANG UP)

Appendix D

R. LEE, SR.: Now there's Frank Gelb, I got to call, you know.

D. BEAVERS: Does he have a son that is a promoter?

R. LEE, SR.: Yeah, his ah, he's got a son that dabbling in it.

D. BEAVERS: Is his name Bruce Gelb?

R. LEE, SR.: Yeah, yeah he used to work for Top Rank.

D. BEAVERS: Yeah, I thought I recognized the name.

(TELEPHONE ACTIVITY)

(2)

Supreme Court, U.S.
FILED
SEP 24 2004
OFFICE OF THE CLERK

No. 03-1691

In the Supreme Court of the United States

ROBERT W. LEE, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Fourth Amendment permits law enforcement officials to monitor and record conversations between a suspect and an informant in a hotel room rented by the informant, but occupied by the suspect, by means of a fixed camera and microphone placed and used with the informant's consent.

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In the Supreme Court of the United States

No. 03-1691

ROBERT W. LEE, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-66a) is reported at 359 F.3d 194. The district court's bench opinion denying petitioner's motion to suppress (Pet. App. 67a-85a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 20, 2004. A petition for rehearing was denied on March 23, 2004 (Pet. App. 86a-87a). The petition for a writ of certiorari was filed on June 21, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted of one count of conspiracy to engage in money laundering, in violation of 18 U.S.C. 1956(h); three counts of interstate travel in aid of racketeering, in violation of 18 U.S.C. 1952(a); and two counts of filing false tax returns, in violation of 26 U.S.C. 7206. He was sentenced to 22 months of imprisonment on each count, to be served concurrently, and was fined $25,000. The court of appeals affirmed. Pet. App. 1a-66a.

1. The International Boxing Foundation (IBF) is one of the major sanctioning bodies for the sport of boxing. Like other such bodies, the IBF crowns world champions in various weight divisions. Each month, the IBF publishes ratings of boxers in each weight division; those ratings are used to determine which boxers will fight in IBF championship bouts. Petitioner was co-founder and president of the IBF. In that capacity, he served on the IBF executive board and on various IBF committees, including the championship committee (which sanctions IBF championship bouts) and the ratings committee (which publishes the IBF's ratings). Pet. App. 3a.

In 1996, the Federal Bureau of Investigation (FBI) received information that boxing promoters were bribing IBF officials in order to obtain more favorable ratings for their boxers. After being questioned about his involvement, the chairman of the IBF ratings committee, C. Douglas Beavers, agreed to cooperate with the FBI as a confidential informant in the ongoing investigation. Beavers admitted that he had solicited and received bribes from boxing promoters and that the bribes had been divided equally among himself; peti-

tioner; Don "Bill" Brennan, the chairman of the IBF championship committee; and petitioner's son, Robert W. Lee, Jr. Beavers testified that he talked regularly with petitioner about strategies for maximizing the amounts of these bribes and about methods for laundering bribes that were received in the form of checks. Beavers implicated a number of leading boxing promoters in the scandal, including Don King and Bob Arum. Pet. App. 3a-4a; Gov't C.A. Br. 6-11.

With Beavers's cooperation, the FBI monitored three meetings between Beavers and petitioner that took place in Portsmouth, Virginia, from June 1997 to October 1998. The first two meetings were held in a hotel suite rented by Beavers for petitioner at the Portsmouth Holiday Inn; the third was held in a conference room at the same hotel. In order to monitor and record the meetings, the FBI installed, with Beavers's consent, a hidden camera and microphone in the room in which each meeting occurred. The camera and microphone transmitted video and audio signals to an adjacent room. The FBI agent who operated the equipment testified that she switched on the monitor and recorder only when Beavers was in the room. For at least one of the meetings, Beavers also wore a microphone on his body, which apparently malfunctioned. During the second meeting, Beavers handed petitioner cash representing his share of a bribe paid by a Colombian boxing promoter to the IBF's South American representative, Francisco "Pancho" Fernandez; during the third meeting, petitioner handed Beavers and Brennan their shares of a bribe paid by King, and Beavers gave petitioner and Brennan their shares of a bribe paid by another Colombian boxing manager. Pet. App. 3a-4a, 31a, 71a; Gov't C.A. Br. 7-8.

2. On November 4, 1999, a federal grand jury in the District of New Jersey indicted petitioner, Brennan, Lee, Jr., and Fernandez on various counts relating to the receipt of these and other bribes. Pet. App. 5a. Before trial, petitioner moved to suppress the video and audio recordings of the meetings at the hotel. The district court denied the motion. *Id.* at 67a-85a.

The district court first held that the recordings from the third meeting were admissible because petitioner had no "actual or reasonable expectation of privacy" in the conference room in which the meeting occurred. Pet. App. 70a. The court then held that the recordings from the first and second meetings were likewise admissible. *Id.* at 70a-85a. The court found that Beavers had consented to the use of the monitoring devices. *Id.* at 71a. The court also observed that the FBI agent had taken reasonable safeguards to ensure that the devices were used to record "only events in which Mr. Beavers personally participated": that is, "event[s] which he himself could have seen and heard, although his line of vision would have been different from the angle of the camera." *Ibid.* Although the court determined that "[t]here were instances in the course of the monitoring where perfection was not achieved," the court found that these instances were "certainly not prevalent," *ibid.*, and that the precautions taken by the agent were "sufficiently effective," *id.* at 72a. The court noted that the government had volunteered to edit from the recordings any visual images that may have occurred at times when Beavers could not see petitioner. *Ibid.* After reviewing decisions from other courts on the use of fixed monitoring or recording devices, the court concluded that "there is not a meaningful distinction of constitutional dimension between a body wire and fixed location video and audio recording equipment where a

voluntary conversation [between suspect and informant] takes place." *Id.* at 83a.

After a jury trial, petitioner was convicted of one count of conspiracy to engage in money laundering, three counts of interstate travel in aid of racketeering, and two counts of filing false tax returns. Pet. App. 2a.[1]

3. The court of appeals affirmed. Pet. App. 1a-66a.

a. The court of appeals reasoned that petitioner's challenge to the admission of the recordings was "inconsistent with well-established Fourth Amendment precedent concerning the electronic monitoring of conversations with the consent of a participant." Pet. App. 5a. The court noted that, in *United States* v. *Hoffa*, 385 U.S. 293 (1966), this Court had held that a defendant has no protected interest under the Fourth Amendment in a conversation with an informant, even when the conversation occurs in a hotel room, and that, in *United States* v. *Caceres*, 440 U.S. 741 (1979), this Court had indicated that the result would be no different if the informant either recorded the conversation directly or carried radio equipment that transmitted the conversation for monitoring or recording elsewhere. Pet. App. 5a-6a. The court reasoned that those cases together stood for the proposition that, "if a person consents to the presence at a meeting of another person who is willing to reveal what occurred, the Fourth Amendment permits the government to obtain and use the best available proof of what the latter person could have testified about." *Id.* at 7a. "This principle," the

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[1] Petitioner was acquitted on various other counts. The charges against Brennan were dismissed because of his ill health and age; Lee, Jr., was acquitted on all counts; and Fernandez remains a fugitive outside the United States. Pet. App. 5a.

court concluded, "appears to doom [petitioner's] argument here." *Ibid.*

The court of appeals then rejected petitioner's attempt to distinguish those cases based on three factors: (i) that the agents used video, rather than merely audio, equipment; (ii) that some of the recordings occurred in petitioner's hotel room, a place in which a person has a heightened expectation of privacy; and (iii) that the monitoring equipment remained in the room when the informant was not present. Pet. App. 7a, 9a-11a. As to the first factor, the court reasoned that, "just as [petitioner] gave up any expectation of privacy in the things that he allowed Beavers to hear, [petitioner] also gave up any expectation of privacy in the things that he allowed Beavers to see." *Id.* at 10a. Although the court conceded that "video surveillance may involve a greater intrusion on privacy than audio surveillance," it noted that "the difference is not nearly as great as the difference between testimony about a conversation and audio recordings of conversations"—a distinction that this Court had not found to be constitutionally relevant. *Ibid.* As to the second factor, the court reasoned that "[w]hat is significant is not the type of room in which the surveillance occurred but [petitioner's] action in admitting Beavers to the room." *Id.* at 9a. The court observed that, in *Hoffa*, many of the conversations at issue had similarly occurred in a hotel room. *Id.* at 9a-10a. As to the third factor, the court reasoned that the mere fact that "the recording device was placed in the room rather than on the [informant's] person" was not constitutionally significant, provided that the defendant had no expectation of privacy in the premises at the time the device was installed (and the entry to install the device thus did not constitute a search); recordings were not made when the informant was not present;

and the recording device was placed in such a way that it could not pick up things that the informant could not have seen or heard while in the room. *Id.* at 10a-11a. Where, as here, none of those circumstances was present, "the recording will not gather any evidence other than that about which the cooperating witness could have testified." *Id.* at 11a.

Finally, the court of appeals rejected the reasoning of *United States* v. *Padilla*, 520 F.2d 526 (1st Cir. 1975), the principal authority on which petitioner had relied. Pet. App. 7a-9a, 11a-13a. At the outset, the court noted that "*Padilla* was decided more than a quarter century ago and has not been followed in any other circuit." *Id.* at 11a. The court reasoned that "the decision in *Padilla* appears to be based, not on the conclusion that the recordings in that case had been obtained in violation of the Fourth Amendment, but on a prophylactic rule designed to stamp out a law enforcement technique that the [c]ourt viewed as creating an unacceptable risk of abuse." *Ibid.* The court expressed doubt that it had the authority to adopt such a rule. *Ibid.* The court proceeded to reject the proposition that allowing officers to use fixed monitoring devices would lead to a substantial risk of abuse. *Id.* at 11a-12a. First, it would violate the Fourth Amendment and federal statutes for officers to monitor conversations that did not involve informants, and a federal officer engaging in such conduct could be sued pursuant to *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Pet. App. 12a. Second, in order to install a monitoring device, officers would first need to obtain the right to enter the premises, thereby rendering the fear that agents could place devices in a person's home "misplaced." *Ibid.* Third, officers would have little to gain by monitoring conversations that did not involve

informants, since those conversations would be inadmissible. *Ibid.* Because "[t]here is no evidence that conversations were monitored when Beavers was absent from the room," and because "the tapes do not depict anything material that Beavers himself was not in a position to hear or see while in the room," the court concluded that petitioner's Fourth Amendment rights had not been violated. *Id.* at 12a-13a.[2]

b. Judge McKee dissented. Pet. App. 30a-66a. He rejected the majority's conclusion that the government took sufficient steps to ensure petitioner's privacy, reasoning that "[the FBI agent] had the ability to manipulate a video camera to see and hear practically everything that [petitioner] did in the privacy of his hotel suite throughout the day and night." *Id.* at 38a. According to Judge McKee, because the limitations on the use of the devices "were defined by the curiosity and scruples of a single agent," they were insufficient to safeguard Fourth Amendment rights. *Id.* at 39a. Judge McKee reasoned that petitioner retained a legitimate expectation of privacy in anything inside the room that he did not knowingly let Beavers see. *Id.* at 42a. He noted that the government had conceded that the camera transmitted video images at times when Beavers could not see petitioner. *Id.* at 45a. Judge McKee then asserted that video surveillance was more intrusive than audio surveillance. *Id.* at 45a-46a. He contended that a fixed video camera inherently acquires visual information that differs from what is seen by an informant. *Id.* at 47a-49a. Finally, Judge McKee suggested that allowing officers to use fixed monitoring

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[2] The court of appeals also rejected petitioner's numerous other challenges to his conviction and sentence. Pet. App. 13a-29a. None of those holdings is challenged in the petition.

devices would lead to a substantial risk of abuse. *Id.* at 57a-63a.

ARGUMENT

Petitioner contends (Pet. 7-14) that the Fourth Amendment prohibited law enforcement officials from monitoring or recording his conversations with an informant in a hotel room by means of a fixed camera and microphone placed and used with the informant's consent. The court of appeals' decision upholding the recording does not conflict with this Court's decisions, and presents no conflict with any decision of another court of appeals that warrants further review at this time.

1. The court of appeals' decision is consistent with an unbroken line of decisions from this Court concerning the acquisition of evidence from conversations between a suspect and an informant.

a. This Court has repeatedly upheld the monitoring or recording of conversations between a suspect and an informant, provided that the monitoring or recording is conducted with the informant's consent. In *On Lee* v. *United States*, 343 U.S. 747 (1952), an informant wearing a microphone and transmitter entered the suspect's workplace and engaged the suspect in conversation, in the course of which the suspect made incriminating statements. *Id.* at 749. The Court upheld the admission of the testimony of an agent who listened to the conversation over a remote receiver. *Id.* at 749-750, 753-754. In *Lopez* v. *United States*, 373 U.S. 427 (1963), the Court reached the same conclusion in a case in which an undercover federal agent was wearing a recording device instead of a transmitter. *Id.* at 430. The Court reasoned that "[t]he Government did not use an electronic device to listen in on conversations it

could not otherwise have heard," but instead used the device only "to obtain the most reliable evidence possible of a conversation in which the Government's own agent was a participant and which that agent was fully entitled to disclose." *Id.* at 439. The Court concluded that the suspect had assumed the risk that the conversation "would be accurately reproduced in court, whether by faultless memory or mechanical recording." *Ibid.*

Similarly, this Court has held that an informant can testify concerning conversations between the informant and a suspect, even if the conversations occurred in a place in which the suspect would otherwise have a heightened expectation of privacy for Fourth Amendment purposes. In *Hoffa* v. *United States*, 385 U.S. 293 (1966), an informant testified about conversations occurring in, among other places, the suspect's hotel room. *Id.* at 296. Although the Court conceded that "[a] hotel room can clearly be the object of Fourth Amendment protection as much as a home or an office," *id.* at 301, it reasoned that the Fourth Amendment protected only "the security a man relies upon when he places himself or his property within a constitutionally protected area," *ibid.* Because the informant was invited into the suspect's hotel room, the suspect "was not relying on the security of the hotel room; he was relying upon his misplaced confidence that [the informant] would not reveal his wrongdoing." *Id.* at 302.

Finally, combining the holdings of *On Lee* and *Lopez* with that of *Hoffa*, this Court has upheld the consensual monitoring or recording of conversations between a suspect and an informant, even if the conversations occurred in a place in which the suspect would otherwise have a heightened expectation of privacy. In *United States* v. *White*, 401 U.S. 745 (1971), an informant wear-

ing a microphone and transmitter engaged in several conversations with the suspect, some of which occurred in the suspect's home and car. *Id.* at 746-747. A plurality of four Justices reasoned that, under *Hoffa*, "a police agent who conceals his police connections may write down for official use his conversations with a defendant and testify concerning them" without violating a suspect's Fourth Amendment rights. *Id.* at 751. Citing *Lopez* and *On Lee*, the plurality asserted that "no different result is required if the agent[,] instead of immediately reporting and transcribing his conversations with defendant, either (1) simultaneously records them with electronic equipment which he is carrying on his person, (2) or carries radio equipment which simultaneously transmits the conversations." *Ibid.* (citation omitted).[3] A majority of the Court subsequently embraced the reasoning of the plurality opinion in *White*, quoting at length from that opinion in concluding that the monitoring and recording of conversations between a suspect and an undercover agent were constitutional. See *United States* v. *Caceres*, 440 U.S. 741, 750-751 (1979).

b. The FBI's use of video, as well as audio, equipment to monitor and record the conversations at issue here does not alter the constitutional analysis. In *Lopez*, the Court expressly sanctioned the use of electronic recording devices to obtain the "most reliable evidence" of the underlying conversation, without differentiating between types of devices. 373 U.S. at 439. At least where, as here, there is no claim that the equipment is so sophisticated as to enable officers to

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[3] Justices Black and Brennan concurred on different grounds. See *White*, 401 U.S. at 754 (Black, J., concurring in the judgment); *id.* at 755 (Brennan, J., concurring in the result).

collect information that the informant could not have collected by means of his own senses (or generally available technology), the use of such equipment does not present any Fourth Amendment concerns. Cf. *Kyllo* v. *United States*, 533 U.S. 27, 34 (2001) (holding that using sense-enhancing technology to obtain information about the interior of a home constitutes a search when "the technology in question is not in general public use").

Similarly, the fact that the devices were placed in a fixed location, rather than on the informant's body, also does not affect the constitutional analysis in these circumstances. Although the initial *placement* of monitoring or recording devices in a suspect's home could itself constitute a search and thus require a warrant, see, *e.g.*, *Lopez*, 373 U.S. at 439, the devices at issue here were installed in a hotel room being rented by the informant with the informant's consent. Of critical importance, the devices were used only when the informant was in the room, and did not record "anything material that [the informant] himself was not in a position to hear or see while in the room." Pet. App. 13a.[4] Accordingly, because "the recording [did] not gather any evidence other than that about which the [informant] could have testified," *id.* at 11a, the use of fixed devices here ensured only that the conversation between the suspect and informant "would be accurately reproduced in

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[4] Petitioner notes (Pet. 4-6) that the informant, Beavers, was in the bathroom during a telephone conversation between petitioner and his son. Evidence in the record, however, suggests that Beavers was able to overhear petitioner during that conversation (even if Beavers was unable directly to see him). Pet. App. 71a-72a, 84a. Moreover, the government offered to delete from the video recording any images that may have occurred at times when Beavers could not see petitioner. *Id.* at 72a.

court," *Lopez*, 373 U.S. at 439, and therefore did not violate the Fourth Amendment.[5]

2. a. The court of appeals' decision is also consistent with almost all of the decisions of other courts of appeals involving the same or similar factual circumstances. Most notably, the Eleventh Circuit upheld the use of an audio monitoring device, installed in a motel room rented by the informant with the informant's consent, that was activated only when the informant was present in the room. *United States* v. *Yonn*, 702 F.2d 1341, 1346-1347, cert. denied, 464 U.S. 917 (1983). The court specifically rejected the suspect's effort to draw a "constitutional distinction which depends upon the location of the recording apparatus." *Id.* at 1347. The court reasoned that "[t]he location of the electronic equipment does not alter the irrefutable fact that [the suspect] had no justifiable expectation of privacy in his conversation with [the informant]." *Ibid.* The Eleventh Circuit subsequently extended that rule to a case in which video monitoring equipment was installed in an office rented by an informant. *United States* v. *Laetividal-Gonzalez*, 939 F.2d 1455, 1460 (1991), cert. denied, 503 U.S. 912 (1992). Citing *Yonn*, the court rejected any distinction between video and audio monitoring, reasoning that "a defendant has no justifiable expectation of privacy when he speaks with someone acting as a government informant, and is unaware that

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[5] Petitioner contends (Pet. 7, 13-14) that the court of appeals' decision conflicts with this Court's decision in *Katz* v. *United States*, 389 U.S. 347 (1967). In *Katz*, however, the Court left "undisturbed" its earlier decisions in *On Lee*, *Lopez*, and *Hoffa*. *Id.* at 363 n.* (White, J., concurring). Moreover, the Court reiterated the general principle that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Id.* at 351.

a recording device is concealed in the room." *Id.* at 1460-1461.

Likewise, the Second Circuit has twice upheld the use of video equipment to monitor conversations between suspects and informants. In *United States* v. *Myers*, 692 F.2d 823 (2d Cir. 1982), cert. denied, 461 U.S. 961 (1983), the court summarily rejected a challenge to the use of what was apparently fixed video equipment at a government-maintained townhouse, reasoning that "[the suspect's] conversations with undercover agents in whom he chose to confide were not privileged, and mechanical recordings of the sights and sounds to which the agents could have testified were proper evidence." *Id.* at 859. More recently, in *United States* v. *Davis*, 326 F.3d 361, cert. denied, 124 S. Ct. 281 (2003), the Second Circuit upheld the use of video and audio equipment that had been concealed in the informant's jacket. *Id.* at 363. The court reasoned that "[the informant] was inside [the suspect's home] with [the suspect's] consent and the hidden camera merely memorialized what [the informant] was able to see as an invited guest." *Id.* at 366.

Finally, and contrary to petitioner's suggestion (Pet. 9, 11-12), the Ninth Circuit has also sanctioned the use of video equipment to monitor conversations between suspects and informants in similar circumstances. In *United States* v. *Nerber*, 222 F.3d 597 (9th Cir. 2000), the court reasoned that suspects had no objectively reasonable expectation of privacy that they would be free from hidden video surveillance while informants were present in a hotel room that had been rented by the government. *Id.* at 604. The court, however, ultimately affirmed the suppression of the fruits of surveillance that occurred *after* the informants left the room. *Id.* at 604-605. The Ninth Circuit later applied

the rule of *Nerber* to uphold the admission of video recordings made in a hotel room rented by the informant, though it left open whether the same rule would apply to recordings of conversations occurring in a hotel room rented by one of the suspects. *United States* v. *Shryock*, 342 F.3d 948, 978-979 (2003), cert. denied, 124 S. Ct. 1729 and 1736 (2004).[6]

b. By contrast, in *United States* v. *Padilla*, 520 F.2d 526 (1975), the First Circuit held that officers could not use fixed audio equipment, installed in a motel room rented by the government, that was activated only when undercover government agents were present in the room. *Id.* at 527. The reasoning of *Padilla* is unsound. In its brief opinion, the First Circuit seemingly concluded that *any* use of a fixed monitoring or recording device was invalid simply because officers *could* use such a device improperly to monitor or record the activities of a suspect even when an informant was not present in the room. See, *e.g.*, *id.* at 528 ("Under this approach a room—or an entire hotel—could be bugged permanently with impunity and with the hope that some usable conversations with agents would occur."). This Court has noted, however, that a court may not use its supervisory powers to suppress otherwise admissible evidence, *United States* v. *Payner*, 447 U.S. 727, 735 (1980), and that it has never held that "potential, as opposed to actual, invasions of privacy

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[6] Other courts of appeals have upheld, albeit without extended discussion, the use of video equipment to record conversations between a suspect and an informant occurring in a hotel room rented and occupied by the informant. See, *e.g.*, *United States* v. *Corona-Chavez*, 328 F.3d 974, 981 (8th Cir. 2003); *United States* v. *Yang*, 281 F.3d 534, 548 (6th Cir. 2002), cert. denied, 537 U.S. 1170 (2003); *United States* v. *McKneely*, 69 F.3d 1067, 1073-1074 (10th Cir. 1995).

constitute searches for purposes of the Fourth Amendment," *United States* v. *Karo*, 468 U.S. 705, 712 (1984). As another court of appeals has observed, the reasoning of *Padilla* thus sweeps too broadly, because "any judicial sanction of electronic recording creates the potential for unauthorized interceptions." *Yonn*, 702 F.2d at 1347 n.5.

Any conflict between *Padilla* and the court of appeals' decision here does not warrant the Court's review at this time. *Padilla* was decided before (i) this Court's decision in *Caceres*, in which a majority of the Court adopted the portions of the plurality opinion in *White* concluding that officers could engage in the consensual monitoring or recording of conversations between a suspect and an informant, even where the conversations occurred in a place in which the suspect would otherwise have a heightened expectation of privacy; (ii) this Court's decisions in *Payner* and *Karo*, in which the Court reasoned that the mere potential for abuse is not a sufficient basis for finding a Fourth Amendment violation or otherwise excluding evidence; and (iii) all of the other decisions of the courts of appeals discussed above, in which courts upheld the use of monitoring equipment in the same or similar factual circumstances. In the nearly 30 years since *Padilla* was decided, no court of appeals has followed it, and the First Circuit has not so much as cited it. In addition, at least two courts of appeals have directly criticized the rationale of *Padilla*, see Pet. App. 7a-9a, 11a-13a; *Yonn*, 702 F.2d at 1347 n.5, as has one district court within the First Circuit, see *United States* v. *Modarressi*, 690 F. Supp. 87, 92 (D. Mass. 1988). In light of these intervening developments, it is unclear whether the First Circuit would continue to adhere to the reasoning of *Padilla*. Accordingly, unless and until the First Circuit

revisits and reaffirms its decision in *Padilla*, further review based on the other circuits' disagreement with that decision would be premature.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 200[illegible]